United Nations A/CN.4/496

General Assembly

Distr.: General
16 February 1999

Original: English

International Law Commission
Fifty-first session
Geneva, 3 May–23 July 1999

Report of the International Law Commission on the work of its fiftieth session (1998)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session prepared by the Secretariat

Contents

		Paragraphs	Page
Introduction		1–4	4
Topical summary		5–189	4
A.	International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)	5–51	4
1.	General comments	5–20	4
(a)	Comments on the draft articles as a whole	5–10	4
(b)	Final form of the draft articles	11	5
(c)	Consequences of the failure to comply with prevention articles	12–15	5
(d)	The Commission's approach to the topic of international liability	16–20	5
2.	Comments on specific draft articles	21–51	6
	Title of the draft articles	21	6
	Article 1. Activities to which the present draft articles apply	22–24	6
	Article 2. Use of terms	25–27	6

99-03913 (E) 090399

	Article 3. Prevention	28–32	7
	Article 4. Cooperation	33–34	7
	Article 5. Implementation	35	7
	Article 6. Relationship to other rules of international law	36	7
	Article 7. Authorization	37–38	8
	Article 8. Impact assessment	39	8
	Article 9. Information to the public	40	8
	Article 10. Notification and information	41	8
	Article 11. Consultations on preventive measures	42	8
	Article 12. Factors involved in an equitable balance of interests	43	8
	Article 13. Procedures in the absence of notification	44	8
	Article 14. Exchange of information	45	8
	Article 15. National security and industrial secrets	46	8
	Article 16. Non-discrimination	47	9
	Article 17. Settlement of disputes	48–51	9
B.	Diplomatic protection	52–76	9
1.	General comments	52–58	9
2.	Diplomatic protection as "primary" or "secondary" rules	59–63	10
3.	Relationship between diplomatic protection and human rights	64–67	10
4.	Admissibility of claims and preconditions to the exercise of diplomatic protection	68–71	11
5.	Whether diplomatic protection is a discretionary right of a State	72–76	12
C.	Unilateral acts of States	77–106	12
1.	General comments	77–80	12
2.	Definition of unilateral acts and scope of the topic	81–101	13
3.	Approach to the topic	102–103	15
4.	Outcome of the work on the topic	104–106	15
D.	State responsibility	107–127	15
1.	General comments	107–109	15
2.	State crime	110–115	16
3.	Requirement of damage	116	17
4.	Attribution	117–118	17
5.	Circumstances precluding wrongfulness	119	18
6.	Countermeasures	120–121	18

7.	Injured State	122–123	19
8.	Reparation	124–125	19
9.	Dispute settlement	126	20
10.	Relationship with other rules	127	20
E.	Nationality in relation to the succession of States	128–141	20
1.	Nationality of legal persons in relation to the succession of States	128–132	20
2.	Nationality of natural persons in relation to the succession of States	133–141	21
F.	Reservations to treaties	142–174	22
1.	General comments	142–154	22
2.	Comments on individual guidelines	155–174	23
G.	Other decisions and conclusions of the Commission	175–189	25
1.	General comments	175–182	25
2.	Long-term programme of work	183–186	26
3.	The question of split sessions	187–189	26

Introduction

1. At its fifty-third session, the General Assembly, under the recommendations of the General Committee, decided at its 4th plenary meeting, on 15 September 1998, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its fiftieth session"[1] and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 13th to 22nd, 32nd and 34th meetings, from 26 to 29 October, and from 2 to 5 and on 17 and 19 November 1998. The Chairman of the International Law Commission at its fiftieth session, Mr. Joao Clemente Baena Soares, introduced the report of the Commission: chapters I to V at the 13th meeting, on 26 October; chapters VI, VIII and IX at the 17th meeting, on 29 October; and chapters VII and X at the 19th meeting, on 3 November. At its 34th meeting, on 19 November, the Sixth Committee adopted draft resolution A/C.6/53/L.16, entitled "Report of the International Law Commission on the work of its fiftieth session". The draft resolution was adopted by the General Assembly at its 83rd meeting, on 8 December 1998, as resolution 53/102.

3. By paragraph 17 of resolution 53/102, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the fifty-third session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of seven sections: A. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities); B. Diplomatic protection; C. Unilateral acts of States; D. State responsibility; E. Nationality in relation to the succession of States; F. Reservations to treaties; and G. Other decisions and conclusions of the Commission.

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10) and corrigendum.

Topical summary

A. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)

1. General comments

(a) Comments on the draft articles as a whole

5. Delegations welcomed the significant progress achieved on this topic during the Commission's last session and expressed their appreciation for the outstanding contribution of the Special Rapporteur which had led to the completion of the first reading of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities). The hope was expressed that the Commission would be able to conclude its consideration of the draft articles during the current quinquennium.

6. Support was expressed for the structure as well as the main thrust of the text. The point was made that the draft, and particularly articles 10, 11 and 12, struck a judicious balance between the interests of States of origin and those of States likely to be affected. There was also a view, however, that this was not always the case.

7. While emphasis was placed on the importance of the draft for the protection of the environment, it was also observed that transboundary harm could occur in other areas, including through electronic and digital means.

8. There was the view that further attention should be paid in the draft to the special interests of developing countries. Thus, the inclusion of an explicit provision on the provision of technical and financial assistance to developing countries was advocated. It was argued, moreover, that the text failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; it was also considered unfortunate that none of the draft articles had been devoted specifically to the need for an overall balance between environmental and developmental imperatives. On the other hand, it was pointed out that "over-nationalization" of standards would hamper uniform application and possibly defeat the goal of the exercise.

9. It was felt that the precautionary principle had not been clearly incorporated in the draft.

10. The view was expressed that the draft articles seemed to be premised upon a highly centralized State with comprehensive regulatory powers; it would be difficult or even impossible to implement those principles effectively in federal States, where regulatory authority was shared.

(b) Final form of the draft articles

11. On this point some delegations expressed preference for a framework convention, arguing that States would be bound by the provisions of such an instrument without losing the freedom to conclude more detailed bilateral or multilateral agreements with respect to specific hazardous or harmful activities or geographical regions with a high concentration of such activities. Others favoured a convention, since that was the only way of providing a solid enough basis for rules on hazardous activities. While the option of a model law received some support, the argument was also put forward that the residual character of the draft militated against its adoption in such form. The possibility of elaborating guidelines forming the framework for regional arrangements was also put forward. There was also the view that any decision on the final form of the draft articles was premature.

(c) Consequences of the failure to comply with prevention articles

12. Although viewing prevention as an obligation of conduct and not of result, several delegations considered that the breach of such obligation was governed by the rules on State responsibility. It was pointed out that this was the case even if the breaches of the primary rules of prevention did not cause actual harm, or could not be shown to have a causal connection with any actual harm suffered. It was added, however, that under such circumstances the consequences of responsibility would be different in scale and in kind than if harm had actually occurred as a result of the breach, in which case full reparation was due. In this connection, the point was made that it was often difficult to establish the causal link between the breach and the occurrence of the damage.

13. It was stressed that the above approach did not exclude the civil liability of the operator who had actually caused the damage, in particular when relevant conventions were applicable. There was also the view that the breach of the obligation of prevention which had resulted in transboundary damage entailed *either* State responsibility *or* civil liability, *or* both. It was believed, however, that since all duties of prevention had been couched in the draft articles in terms of obligations upon States, there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context.

14. On the other hand, the question was raised as to how failure to perform a duty that had not resulted in an effect could give rise to an actionable cause. It was also felt that the draft articles should not call for penalties in cases where States had failed to comply with the obligation of prevention, whether or not transboundary damage had occurred. A further view was that sanctions should apply only where a State or operator deliberately failed to comply with such obligation and not in case of lack of capacity to do so.

15. There was also a view that it was important to establish solid legal bases for measuring compliance and identifying the degree of violation, rather than resort to theoretical discussions about "obligations of conduct".

(d) The Commission's approach to the topic of international liability

16. Support was expressed for the Commission's decision to separate the regime of prevention from that of liability, and to focus first on the former. It was argued that the completion, at the Commission's last session, of the first reading of the draft articles on prevention was evidence of the wisdom of that approach.

17. A view was expressed that since work on the issue of liability would require the establishment of a separate regime for each category of hazardous activity, residual rules would be of little use; the problem was even more complex with respect to activities which actually caused significant harm. It was therefore proposed that consideration of the topic of liability should be postponed until the Commission had considered the issues relating to international environmental law mentioned in paragraph 43 of its report.

18. On the other hand, a number of delegations made the point that emphasis on prevention should not lead to a deviation from the original objectives regarding this topic. Thus, several delegations urged the Commission to proceed with the question of liability. It was argued, in this connection, that principles concerning prevention could not be determined in isolation from the principles concerning liability; indeed, it was important to be realistic and also have a regime which dealt adequately with the consequences of harm when it nonetheless occurred. It was further stated that the basic assumption of the topic, that the competing rights and interests of States were best adjusted without the need to determine wrongfulness, required primary rules of liability to be formulated in conjunction with primary rules

of prevention. The Secretariat's valuable survey of liability regimes showed that developing State practice since the Commission had first taken up the topic confirmed that this basic assumption was fully justified. The importance of the principle of compensation of innocent victims was also emphasized.

19. The view was expressed that the principles regarding liability applied irrespective of the level of development of the State concerned, although this factor could be taken into account in the determination of payable compensation. The point was also made that a State's capacity to prevent or minimize the risk of causing harm should be a fundamental criterion in determining liability.

20. It was observed that the study of the question of liability should not be limited to State liability, but should also address principles of civil liability and the relationship between the two. Some delegations considered that the principle of strict liability should apply to States. Others felt that it might be more appropriate to assign primary liability on the operator and only a secondary liability to the State. It was thus argued that the activities of the primary actors should not escape attention; the person responsible for pollution or harm should bear direct and consequential costs, as required by a number of international instruments.

2. Comments on specific draft articles

Title of the draft articles

21. There was a view that the title of the draft articles would be improved by inserting the word "potentially" before "hazardous", for in cases where transboundary damage was preventable, the activity should not necessarily be deemed hazardous. Another suggestion was to change the title in order to emphasize the underlying notion of environmental damage inherent in the reference to harm caused through physical consequences.

Article 1. Activities to which the present draft articles apply

22. There was support for the Commission's decision to formulate article 1 in general terms rather than spell out a list of activities within the scope of the draft articles. The view was however expressed that, at a later stage, a list of such activities might prove useful in resolving lingering conceptual difficulties. The concern was further voiced that in the absence of any specification many hazardous activities which were crucial for development might be covered by the draft. Questions were also raised as to the decision to include neither ultrahazardous activities nor activities which actually caused harm within the scope of the draft. There was also the view that the scope should be limited to particularly hazardous activities. It was suggested that there should be included in article 1 a reference to the risk of causing significant harm to an ecosystem.

23. The view was expressed that the scope of application appeared to be defined adequately by means of a threshold applying to both risk and harm. While some felt that the controversy surrounding the term "significant" had been settled during the negotiation of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and that the Commission was therefore justified in using this term in the current draft, others felt that its meaning was still unclear and that the Commission should take another look at the matter. It was even proposed that the term should be deleted altogether. Concern was further expressed that the interpretation of the expression "significant harm" in the draft articles would have an impact on the interpretation of that phrase in the context of the 1997 Convention.

24. There was also a suggestion to replace the phrase "risk of causing significant harm" with "significant risk of transboundary harm", as it was felt that the former wording unnecessarily blurred the exact legal interrelationship of the crucial elements of the risk, probability and consequence of the injurious event. It was added that the related assumption in paragraph (13) of the commentary to article 1 that the core concern of the draft articles was future harm as against present, or ongoing, harm, was not fully convincing and reflected a basic conceptual weakness in the Commission's approach. The proper distinction was rather between events that were certain and those that were less than certain, and possibly quite improbable.

Article 2. Use of terms

25. The definition in paragraph (a) was welcomed by some delegations. However, the view was expressed that it lacked precision, which was considered particularly disturbing in the light of the fact that the scope of the draft could encompass a wide range of activities crucial for development. There was a suggestion to replace the phrase "a low probability ... other significant harm" either by "any risk within a range extending from a high probability of causing significant harm to a low probability of causing disastrous harm", or by "a low probability of causing disastrous harm or a high probability of causing significant harm and any risk lying between the two extremes".

26. Support was expressed for the inclusion of paragraph (b).

27. As regards paragraph (c), the extension of the scope of the draft beyond activities in the territory of a State to those within the jurisdiction or control of a State was welcomed by some delegations. Others however considered such scope to be still too restrictive; it was argued in particular that the International Court of Justice, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[2] had referred to prevention specifically in relation to areas over which no State had sovereignty. In this connection, it was proposed that the Commission explore the feasibility of an entity or institution being empowered to act on behalf of the international community in the event of damage to the global commons, perhaps through the establishment of a high commissioner on the environment.

Article 3. Prevention

28. Several delegations agreed with the Commission that prevention was an obligation of conduct and not of result. It was observed that such obligation was appropriately based not on an absolute concept of minimization of risk, the limits of which would be very difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. There was also the view, however, that construing prevention as an obligation of conduct left many questions unanswered.

29. The view was expressed that the concept of "due diligence" should be explicitly mentioned in article 3 and that its nature and scope should be determined more precisely. In this connection, the point was made that this concept involved an objective element, traceable to the fact that hazardous activities carried, as it were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. It was also stated that article 3 could be enhanced by the addition of elements derived from existing environmental conventions. It was further believed that article 3, like article 7 of the 1997 Convention, should contain a reference to the balance of interests among States concerned, since articles 11 and 12 of the draft only contained procedural provisions. There was the view, moreover, that article 3 should also deal with the obligation to mitigate the effects of harm once it had occurred.

30. It was felt that assistance should be extended to developing countries to enable them to fulfil the obligation in article 3. The point was also made that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with such obligation.

31. The view was expressed that article 3 and the commentary thereto suggested that a State's obligation to prevent "significant transboundary harm" that was bound to occur might be discharged by the State's taking measures either to prevent or to minimize the risk of such harm. The underlying assumption that State conduct involving the risk of inevitable significant transboundary harm did not, as such, also entail that State's obligation to cease and desist from the risk-bearing conduct was considered highly questionable, and a reflection of an anachronistic view of the fundamental balance of States' rights and obligations in situations in which a significant degradation of the environment was involved.

32. Divergent views were expressed on the deletion of the provision contained in article 3 of the text adopted by the Commission's Working Group in 1996 regarding the freedom of action of States and the limits thereto imposed by the general obligation of prevention or minimization of the risk of causing significant transboundary harm.

Article 4. Cooperation

33. Special emphasis was placed on the importance of this article. It was observed that the principle of cooperation underlined the transboundary nature of environmental protection. The point was made that the concept of cooperation in good faith could be strengthened with a view to overcoming any tendency to sideline environmental considerations in favour of political and security interests, for example; thus the Commission might consider the need for a more detailed mechanism to ensure that States upheld the principle in article 4.

34. It was suggested that the article should be split into two separate provisions, one stipulating the principle of cooperation in good faith, the other dealing with the question of the possible assistance of international organizations.

Article 5. Implementation

35. While some delegations expressed support for this article, its usefulness was also called into question.

Article 6. Relationship to other rules of international law

36. Article 6 was deemed to provide an important clarification; indeed it was stated that, while the

[2] *I.C.J. Reports 1996*, p. 242, para. 29.

Commission's work on a comprehensive set of articles on prevention of transboundary damage from hazardous activities deserved full support, other rules and developments in that area of international law should be admitted, and it was important not to make premature commitments concerning the subject. There was also the view, however, that the article, while important in underlining the residual character of the draft articles, did not seem to be informative, particularly when read in conjunction with article 1.

Article 7. Authorization

37. Support was expressed for this article. There was also the view, however, that the criteria for the requirement of prior authorization should be somewhat narrowed. While some delegations welcomed the inclusion of paragraph 2, others considered that the extension of the requirement of prior authorization to pre-existing activities could give rise to major problems with regard to acquired rights and foreign investment, possibly even leading to international claims.

38. The view was expressed that the provision in paragraph 3 was particularly appropriate, as otherwise the principle of prior authorization would lose much of its practical effect. It was felt, nevertheless, that the paragraph required further elaboration in order to define the type of operator referred to in paragraph (8) of the commentary to the article, in view of the legislative and administrative proceedings that could be involved.

Article 8. Impact assessment

39. The importance of this article was underlined by some delegations. However, there was a view that the concept of impact assessment, although worthwhile, should under no circumstances be interpreted as depriving a State of its sovereign right to develop its natural resources in the interests of its economic well-being.

Article 9. Information to the public

40. While some delegations supported the text of article 9, considering in particular that it was in keeping with new trends in international law, others expressed reservations. It was also felt that the provision required further clarification so as to make it more readily applicable.

Article 10. Notification and information

41. Support was expressed for article 10, which was considered to be in line with recent developments in international law. However, it was felt that further clarification would make the provision more readily applicable. While some delegations welcomed the use of the phrase "with timely notification", others believed that all the time-frames mentioned in article 10 were too vague, and expressed their preference for the indication of specific periods. In this respect, six months was considered the maximum acceptable.

Article 11. Consultations on preventive measures

42. The inclusion of the article was welcomed. It was felt that an appropriate balance between the interests of the States concerned was maintained by emphasizing the manner in which, and the purpose for which, the parties entered into consultations.

Article 12. Factors involved in an equitable balance of interests

43. Support was expressed for the provisions in article 12, which, it was noted, provided significant guidance to States. It was further felt that the article took into account the problems of developing countries as regards availability of means of preventing harm. The point was made, however, that the text contained an unnecessary repetition, which could lead to confusion: thus harm to the environment, mentioned in paragraph (c), was already covered by paragraph (a). There was also the view that activities which involved a risk of harming the environment should not be merely one of the factors involved in an equitable balance of interests, but should be simply forbidden.

Article 13. Procedures in the absence of notification

44. Satisfaction was expressed with the text of article 13. However, there was also the view that the term "reasonable time" in paragraph 2 was too vague, and preference was expressed for a specific time limit not to exceed six months. A question was raised as to the rationale for including the additional and somewhat ambiguous elements contained in paragraph 3.

Article 14. Exchange of information

45. Article 14 was welcomed, as it was considered to be in keeping with new trends in international law.

Article 15. National security and industrial secrets

46. It was felt that article 15 struck an appropriate balance between the various interests involved.

Article 16. Non-discrimination

47. The view was expressed that article 16 was a central provision, which would substantially reduce the possibility of disputes between States and facilitate the implementation of the draft articles. There was also the view, however, that the provision could merely serve as a guideline for progressive development of the law, since it could only be effectively implemented where the legal systems of States concerned were compatible. It was suggested that the phrase "who may be or are exposed to the risk of" should be replaced by "who have suffered, as a result of non-compliance with the duty of prevention".

Article 17. Settlement of disputes

48. The inclusion of article 17 was welcomed. It was observed that compulsory recourse to a fact-finding commission was a sufficiently flexible procedure and might be useful for the purposes of establishing and assessing facts relevant to the dispute. The point was made that the details concerning the composition and functioning of the fact-finding commission could be laid down in a separate annex and that the provisions of article 33 of the 1997 Convention might serve as a model in this respect. The question was raised, however, as to why initiation of the procedure should be delayed for six months in the absence of an agreement between the parties.

49. Some delegations held the view that the nature of the topic was such as to make the inclusion of binding mechanisms absolutely essential. Views were divided, however, as to whether arbitration or judicial settlement constituted the preferred option.

50. Other delegations were opposed to the establishment of a compulsory procedure for dispute settlement, believing that potential disputes under the draft articles were more amenable to resolution through negotiation or consultation. Recourse to a conciliation commission was also suggested as a possible method. It was further argued that the above means allowed for a more expeditious settlement of potential disputes, which was of essence in the area of prevention.

51. There was also the view that the question of the procedures for dispute settlement was closely linked to that of the final form of the draft articles. It was further felt that, since dispute settlement procedures would be covered by the draft articles on State responsibility, they need not be included in those which dealt with prevention and liability.

B. Diplomatic protection

1. General comments

52. Many delegations expressed the view that diplomatic protection was a topic of great practical significance which was ripe for codification and on which there was already a sound body of legislation. The rules of diplomatic protection were closely related to those governing both relations between States and traditional public international law; they clarified the division of competence between States and helped to ensure respect for international law as it related to the protection of foreign nationals in a host State, without prejudice to any other relevant legislation.

53. The remark was also made that the topic of diplomatic protection involved a series of complicated theoretical and practical questions and had an unfortunate history, having been regarded as an extension of colonial power or a system imposed by powerful States on weak States. The Calvo clause had been a kind of legal reaction on the part of Latin American developing countries to the exercise of diplomatic protection by foreign States. With the decision on the *Mavrommatis Palestine Concessions* case, it became a basic principle of international law that a State had a right to protect its nationals when they were injured by internationally wrongful acts of another State and a satisfactory settlement could not be obtained through normal channels. Hence, the purpose of diplomatic protection was to rectify the unfavourable and unjust treatment suffered by a State's nationals as a result of violations of international law by another State. Although it had been abused in the past and would probably be abused in the future, diplomatic protection was not in itself a system used by the big and powerful to bully the small and weak. Practice had shown that diplomatic protection had its advantages and it had been adopted by many States in various regions.

54. Some delegations disapproved the idea put forward by the Special Rapporteur that diplomatic protection should be recognized not as an inter-State institution of international law but as an arrangement under which the State acted as agent for its injured national. In their view, this approach would not be codification of international law but a radical reformulation of it. They found it hard to see what benefit would flow from it. In their view the traditional conception of diplomatic protection — that the State, by taking up the case of one of its subjects, was asserting its own right — should be retained. The question whether the State that exercised diplomatic protection was protecting its own right

or that of its injured national was a rather theoretical one, and might not be useful to the debate.

55. On the other hand, the view was expressed that the Special Rapporteur had correctly identified one of the major issues relating to the topic, namely, whether the rights involved in diplomatic protection belonged to the State or to the individual. While it was clear that the right to invoke diplomatic protection belonged to the State, the right itself, as suggested in the Special Rapporteur's report, belonged to the individual. As views on that subject had evolved a great deal over the past 30 or 40 years, his delegation believed that the question should be considered not only from the standpoint of customary law, but also in the light of current practice. The comment was made that the Commission's decision to tackle the whole question of diplomatic protection, including the protection of companies or associations as well as persons, could create difficulties. It would be prudent to limit the first part of the Commission's work to the general aspects of the issue and the protection of physical persons, where codification would not be too difficult. The protection of companies or associations could be tackled later on. That approach would have the advantage of ensuring that rules relating to physical persons could be codified unhampered by disputes over protection for companies and associations, which might hold up all the work relating to diplomatic protection.

56. It was noted with regret that it had not yet been possible to produce draft articles that could provide a focus for the Commission's future debates. If the Commission intended to abide by its own schedule of work, it should consider specific, more narrowly defined issues rather than engaging in yet another round of general discussions.

57. A suggestion was made that the title should be amended, as the phrase "diplomatic protection" connoted traditional State-to-State relations and appeared to be easily confused with the law on diplomatic relations, which had the protection of diplomatic rights and duties as its main purpose.

58. A comment was further made that the relationship between State responsibility and diplomatic protection needed further elaboration because of the large common ground that existed between the two concepts.

2. Diplomatic protection as "primary" or "secondary" rules

59. Many delegations noted with satisfaction that the Commission had decided to confine its study to the codification of secondary rules, which were procedural in nature. The Commission should establish as a precondition the existence of a wrongful act of the State, but its study should not extend to the content of the international obligation that had been breached.

60. Many delegations supported the conclusion of the Working Group that the customary law approach to diplomatic protection should form the basis for the Commission's work on that topic.

61. The view was also expressed that international law could not be placed in watertight compartments of "primary" and "secondary" rules. The Commission should discuss primary rules only where necessary for the appropriate codification of secondary rules. Theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. Furthermore the study of diplomatic protection must also include the study of the means for exercising it, namely, the traditional machinery for the peaceful settlement of disputes and the question of countermeasures.

62. The remark was made that the Commission in its consideration of diplomatic protection should distinguish the two categories of primary and secondary rules as clearly as possible. It was true that part of the doctrine tended to view diplomatic protection as a mechanism allowing the State to act as an agent of its national who had a legally protected interest. That, however, was hardly the approach adopted by chanceries in their everyday work. The Working Group had therefore been right to conclude that the "customary law approach to diplomatic protection" should form the basis for the Commission's work.

63. However, the view was also expressed that the distinction between "primary" and "secondary" rules was useless in the context of diplomatic protection, and it would not be appropriate to focus on the relationship between the international responsibility of States and diplomatic protection since the latter was only one aspect of a much larger field of responsibility.

3. Relationship between diplomatic protection and human rights

64. Some delegations expressed doubts on the prudence of establishing a relationship between human rights and diplomatic protection. They believed that the Commission's work should not entail the assimilation of the two institutions or the establishment of a hierarchy between them. That was

not to say, of course, that the Commission should not study the rights covered by diplomatic protection, including human rights, but rather that human rights and diplomatic protection should not be specifically linked in any draft articles on the topic. The international norms governing the two had overlapping, but intrinsically different, public order functions. In particular, the assimilation of the two subjects had no basis in existing international law and it was doubtful that it would become part of the international legal order in the immediate future.

65. The view was also expressed that international human rights instruments limited the scope of national jurisdiction by guaranteeing uniform standards of protection, whereas diplomatic protection functioned exclusively in relations between States and after domestic remedies had been exhausted. It was further noted that diplomatic protection did not necessarily have any connection with human rights, since it often had to do with questions of inheritance or property. Similarly, human rights protection could be achieved without recourse to diplomatic protection. Moreover, juridical bodies for the protection of human rights, unlike those concerned with diplomatic protection, were well established in both the internal legal order and the international system; that was a matter that the Commission should consider.

66. It was also stressed that the exercise of diplomatic protection would thus remain a right of the State, whereas international human rights protection systems served individual rights. The two mechanisms should remain separate, even if their aims partially overlapped. The Commission should focus on diplomatic protection and should not prejudge questions relating to international human rights protection; for example, it should avoid the question whether the exhaustion of local remedies included the opportunities offered by international human rights protection systems.

67. The comment was also made that the work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and that the actual and specific effect of such developments should be examined in the light of State practice. In that context it was observed that a significant share of the issues falling under the topic of diplomatic protection were human rights issues; all allegations of mistreatment of nationals of one State in another State generally involved the abuse or alleged abuse of human rights. Accordingly, caution must be exercised when trespassing on the regime of human rights law, as a delicate balance existed in that area which must be preserved.

4. Admissibility of claims and preconditions to the exercise of diplomatic protection

68. A number of delegations commented on the issues of admissibility of claims and preconditions to the exercise of jurisdiction. The first precondition was that there must be a proof that an injury had been inflicted on a national, that the injury was a breach of international law, that it must be imputable to a State and that a causal link existed between the wrongful act of the State and the injury. The second precondition was somewhat more complex, i.e., that injured subjects must have been unable to obtain satisfaction through domestic remedies. The second precondition should be studied in the light of the development of international law and the options available to individuals who had suffered injury. The Commission should address the question as to whether the resort to an international body to protect human rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

69. It was also stated that it would be particularly interesting to analyse the possible impact of the new dispute settlement procedures established in some international instruments which gave aliens direct access to foreign courts. The clearest example of that was in agreements on protection of investments. Such new rights for the individual which eliminated the role of the individual's own State had obvious repercussions for the traditional treatment of diplomatic protection. The effect could be bad as well as good, since it could give rise to inequality: whereas a foreigner had various avenues of recourse open to him, the national of a State might be able to resort only to his own domestic courts. The Commission should look into such developments and establish rules that would protect the whole range of rights and obligations, which had so many political implications.

70. A remark was made that the Commission in its consideration of the topic should place greater emphasis on the rule regarding the exhaustion of domestic resources. That principle, which was a well-established rule of customary international law, should be fully honoured in the draft articles, but did not seem to have been given due importance, despite its inclusion in a number of recent treaties.

71. It was stated that the Commission should not attempt to define the relationship between the nationality of natural or legal persons and the conditions under which such nationality had been granted. The Commission should not consider the question whether the individual had respected the law of the State in whose territory he or she was. It

would be useful to stress the conditions under which the individual's behaviour might exempt the host State from responsibility.

5. Whether diplomatic protection is a discretionary right of a State

72. Many delegations expressed the view that the exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection. It was agreed that the discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right.

73. In asserting the right to diplomatic protection, the State took into account not only the interest of its national who had suffered injury because of a wrongful act of another State, but also a number of issues related to the conduct of its foreign policy.

74. In this connection it was stressed that clearer reference should be made to the view that the exercise of diplomatic protection in certain cases could become secondary to foreign policy considerations deemed substantial enough to justify overriding the relative importance of such protection. The fact that State practice appeared to bear out that position indicated the need to introduce some element of hierarchy into the weighing of a State's interest or obligation concerning the protection of its nationals against its wider diplomatic or political interests, particularly in the case of human rights issues. In certain cases, however, arrangements to realize an individual's right to protection could be better achieved between the two States concerned through the diplomatic channel. Consideration might later be given to situations in which a State was placed in an unnecessary position by an individual who made a wrongful claim or a claim that was unfounded in international law.

75. The remark was also made that it was necessary to examine the consequences of that shift in perspective for individual rights. Three such consequences could already be observed: first, presentation of a claim of diplomatic protection was not always left to the discretion of the State; in many cases, there was an element of compulsoriness; secondly, distribution of the compensation obtained was not always left to the discretion of the State; and thirdly, the damage invoked in claims presented by the State did not always differ from the damage sustained by the individual. The shift in perspective was evident, for example, in bilateral investment protection treaties and the International Centre for Settlement of Investment Disputes (ICSID) Convention. In current practice, the State most often acted as the agent of the individual in providing a channel for an international claim where no direct channel existed.

76. The comment was made that it was essential to take the views of the developing world into account. There was a clear need to distinguish between the possession by States of diplomatic protection rights and their consequent exercise of such rights in regard to individuals under their protection. It was a State's sovereign prerogative to protect the rights and interests of an individual who was linked to it by nationality. However, since a State might fail to pursue the cause of such an individual for reasons beyond the individual's control relating to the relative influence possessed by the State of nationality of the individual in the international arena, the Commission should take into account the need to establish guidelines on the discretionary power of States to provide diplomatic protection.

C. Unilateral acts of States

1. General comments

77. Many delegations underlined the importance of the study of the topic, its intrinsically complex nature, the many diverging views which existed on the meaning of "unilateral acts" in theory and practice and the great increase in the number and types of unilateral acts which had taken place in recent years. An in-depth examination of the topic, it was said, could be of great assistance in the orientation of State practice. The development of rules or guiding principles, it was also said, would help to clarify various aspects related to the unilateral acts of States.

78. Support was expressed for the progress already achieved by the Commission at its initial stages of the topic's consideration and for the first report of the Special Rapporteur. The suggestion was made that the Commission could next focus on aspects concerning the elaboration and conditions of validity of unilateral acts.

79. A view was expressed, on the other hand, that the preliminary report and its discussion in the Commission appeared to leave the topic at once both too narrow and too broad. According to this view the Commission should focus its preliminary studies far more closely on the main practical problems that needed to be examined. Without that as a basis for future decisions it was doubtful whether the Sixth

Committee would be in a position to decide whether detailed work on the topic would be well-founded or feasible.

80. According to another view, the Commission was not in a position to achieve much progress on the topic since some of its members considered unilateral acts to be a source of international law while others saw them as a source of international obligations.

2. Definition of unilateral acts and scope of the topic

81. Support was expressed for the elements of the definition of unilateral acts suggested in the Commission's report, which viewed unilateral acts as an autonomous, unequivocal and notorious expression of the will of a State which produced international legal effects. This definition, it was said, provided an interesting basis for further work, in particular, for delimiting the scope of the topic.

82. The primary question, it was said, was whether the act of the State had been intended to produce legal effects vis-à-vis one or more other States which had not participated in its performance and whether it would produce such effects if those States did not accept its consequences, either explicitly, or as implied by their subsequent behaviour.

83. The autonomous element of a unilateral act was stressed by some delegations as essential in the sense that such acts were capable by themselves of producing legal effects under international law and did not depend for this purpose either upon the performance of another act by some other State or upon its failure to act.

84. In connection with the basis of the binding nature of unilateral acts, one view stressed the principle of good faith and the desirability of promoting security and confidence in international relations. It was also stressed that the obligatory nature of such acts was dependent on the intention of the State which performed them rather than on another State's legal interest in compliance with the obligations it created.

85. Several delegations underscored the need to delimit the scope of the topic from the outset so that the analysis would be more thorough and could progress more rapidly. It was necessary to establish a clear framework that could facilitate the Commission's work by identifying the categories of unilateral acts which should be examined by the Commission and those that should not.

86. The importance of the definition of unilateral acts for delimiting the topic's scope was stressed. It was important, it was said, to prevent the scope of the topic from becoming too broad or narrow and to stress the criteria for a unilateral legal act, which must produce legal effects in respect of subjects of international law which had not participated in its performance and must generate legal consequences independently of the manifestation of the will of some other subject of international law. In this connection several delegations supported the view that the Commission's study should be limited to the acts of States which were "strictly" unilateral, i.e., whose purpose was to produce international legal effects and had an autonomous character. That would mean excluding unilateral political acts as well as acts linked to a specific legal regime.

87. Some delegations pointed out that it was not always easy to determine whether a given act was legal or political in nature. International courts, one view maintained, had often made that determination on the basis of the intention of the State and the consequences of the act in question. According to another opinion, the Commission should not take too narrow a view of its future work on the topic. While it could be useful to consider the legal effects of declarations and other formal statements intended to have legal consequences, problems could arise precisely because it was not always clear whether particular words or actions were intended to have such consequences. According to this view, the Commission should broaden the scope of its work and not to confine itself to unilateral statements clearly intended to have legal effects.

88. A view was also expressed that a major difficulty lay in the virtual impossibility of distinguishing between unilateral acts aimed at creating a normative legal obligation and those which were purely political in nature. The suggested focus on the "intention" of the performing State as a leading criterion was problematic since that element did not lend itself to objective evaluation. It would, moreover, be inappropriate to use specific formal criteria to characterize a binding legal declaration. Given the impossibility of finding a more scientific definition of a unilateral declaration, one was forced to come back to the three prior conditions proposed by the Rapporteur: the intention of the declaring State, the circumstances in which the declaration had been made and the contents of the declaration. In practice, however, the first and second criteria were often seen as one because the circumstances were usually perceived as the only means of evaluating intention. In this view, while the importance of the principle of good faith in contractual international relations should be recognized, it should not be considered as an adequate basis for determining the binding nature of a declaration. Contrary to what was the case in the law of treaties, reciprocity was

not needed in the case of a unilateral declaration, nor was any notification of acceptance of the declaration by other States. According to this view, any attempt to classify unilateral declarations within strict categories would run counter to the actual practice in the international arena. Furthermore, any attempt to set strict boundaries would impede political manoeuvring by States, with the inevitable result that practical ways would be found to bypass the restrictions. This view considered it imperative to limit the topic as much as possible and to restrict consideration to the existing international principles of good faith, estoppel and international customs and practice.

89. Several delegations maintained that acts linked to a specific legal regime should be excluded from the Commission's study. Specific mention was made in this connection of acts connected with the law of treaties, such as offer, acceptance, signature, ratification and the formulation of reservations.

90. As regards silence, acquiescence and estoppel, some delegations expressed themselves in favour of including them in the study of the topic, since they could, if only implicitly, have consequences for other subjects of international law.

91. Some other delegations, however, did not think that silence could be viewed as a unilateral act, even though it could be considered a sign of a State's intention to assume legal obligations or to accept a legal situation.

92. As regards estoppel, doubt was expressed that unilateral statements made by the agent of a State in the course of proceedings before an international court or tribunal could be considered to be unilateral acts of the State. It was also pointed out that estoppel did not constitute a truly unilateral act because it was not specifically intended to create an obligation by the State invoking it and because in any case the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State in that conduct.

93. In the view of other delegations, while the Commission, at an initial stage, could confine itself to the study of "strictly" unilateral acts, at a later stage, and in the light of the results achieved in that study, it might examine other less formal expressions of the will of States which were particularly relevant in international practice, such as acquiescence, silence and estoppel.

94. Several delegations addressed the questions whether the scope of the topic should extend to unilateral acts of subjects of international law other than States, such as acts of international organizations or to unilateral acts of States addressed to other subjects of international law.

95. As regards unilateral acts of international organizations, a number of delegations were of the view that these acts should be excluded from the Commission's study. Although they were genuine unilateral legal acts, they were special in character and purpose, required special rules and consequently fell outside of the Commission's mandate. The practical usefulness of including such acts was also questioned. Some of the delegations which were against the inclusion of these acts felt that if they were nevertheless finally included their treatment should be limited in scope.

96. Some other delegations believed that the Commission should not definitively discard the possibility that it might extend the scope of the topic to unilateral acts of international organizations even if at the first stage of its work it should focus on unilateral acts of States.

97. Concerning unilateral acts of States issued in respect of subjects of international law other than States, several delegations did not see the reason why such acts should not be covered by the scope of the topic, especially as in contemporary practice many unilateral acts of States were addressed both to States and to international organizations. A broad approach, it was also said, was clearly preferable, particularly taking into account the growing participation of actors other than States in the international legal process. Consequently, the scope could be extended not only to State acts issued in respect of international organizations but also in respect of other limited subjects of international law.

98. According to another view, while it was too soon to decide whether the scope of the topic should also extend to unilateral acts of States issued in respect of other subjects of international law, the Commission should nevertheless take into account all possible beneficiaries of unilateral acts as it should consider the role of unilateral acts of States in the development of customary international law.

99. Some delegations agreed with the Special Rapporteur and the Commission that unilateral acts giving rise to international responsibility should be excluded from the Commission's study, particularly since the Commission was engaged in the study of State responsibility. Thus, it was pointed out that legal actions, namely the conduct of States, which might be lawful or unlawful and, in the latter case, generated international responsibility, were not intended to establish general or individual rules.

100. In another view, however, although it was true that the Commission was engaged in a specific study of State responsibility, the question of whether and to what extent

a unilateral act might entail State responsibility was of great interest in the context of the present topic. According to this view there was an interesting parallel with the law of treaties. Article 37, paragraph 2, of the Vienna Convention on the Law of Treaties stated that when a treaty created a right for a third State, that right could not be revoked or modified by the parties if it was established that it was intended not to be revocable or subject to modification without that State's consent. It might, then, be considered, *mutatis mutandis*, that if a unilateral act, such as a declaration, was clearly intended to create a right for a third party, the author State could not unilaterally revoke it, and if it did so, it would incur responsibility. According to this view, such questions fell logically within the scope of the Commission's study.

101. Also concerning the scope of the topic, one view stressed that it would be most useful to continue studying the development of the consolidated rules of the law of treaties in order to determine how far they could be adapted to the regulation of unilateral acts. According to this view, it was important to establish a definition of rules of interpretation, both those governing unilateral acts and those that could be applied equally to unilateral acts and to international treaties.

3. Approach to the topic

102. Some delegations endorsed the approach suggested by the Special Rapporteur that the Commission should focus its attention not so much on the "*negotium*" or substantive content of unilateral acts but rather on the "declaration" as a prototype, instrument or formal procedure whereby a State could produce legal consequences in a unilateral manner on the international plane. In this connection, a parallel was drawn between a "declaration" with regard to the law of unilateral acts and the "treaty" in relation to treaty law. These delegations doubted the usefulness of trying to divide unilateral acts into categories such as "protest", "promise", etc.

103. Other delegations did not make a distinction between the formal instrument or declaration and its substantive content. They suggested that the Commission should not limit its study to a single category of unilateral acts, such as declarations, but should work on all the main categories of unilateral acts, such as, for instance, promise, recognition, renunciation and protest.

4. Outcome of the work on the topic

104. There was general support for the Commission's decision to proceed with the consideration of the topic on the basis of the elaboration of draft articles with commentaries to be prepared by the Special Rapporteur in his future reports. This course of action would foster stability and security in international relations and promote clear, concise and systematic codification.

105. The above course of action, it was also stressed, did not prejudge the final outcome of the Commission's work on the topic or on the form which in the end such articles would take, whether a convention, guidelines or recommendations.

106. In this connection, one view was expressed that the final product should be in the form of a guide to practice rather than a draft convention.

D. State responsibility

1. General comments

107. Many delegations noted with satisfaction the progress made by the Commission in its reformulation of the rules on State responsibility. They also expressed support for the Commission's efforts to amalgamate some provisions, or delete articles. It was observed that the draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision. In that regard, several delegations called for the early completion of a generally acceptable instrument on State responsibility. However, the view was also expressed that any major changes would undermine the growing authority that many of the draft articles were acquiring, and that revisions would create undesirable delay in finalizing the draft articles.

108. While there was general agreement on the structure of the draft, the remark was made that Part Two, as it emerged from the first reading, did not seem well organized. Reorganization would therefore appear necessary in order to take into account the choices made in Part One. Concerning the content of the draft articles, support was expressed for distinguishing between "primary" and "secondary" rules, with only the latter being codified. In this regard, reservations were expressed regarding some draft articles because they addressed primary rules. It was noted in this regard that, while there was nothing to prevent the

Commission from stating as a prior condition to its work the existence of a wrongful act by a State, the study should not deal with the content of the international obligation which had been breached.

109. With regard to the form of the draft articles, different views were expressed. Some delegations preferred an international convention as opposed to a declaration or guidelines. In this connection, it was noted that since State responsibility had a central place in international law, to have it established in binding terms, with wide acceptance, would serve to strengthen confidence in the legal dealings between States. On the other hand, the view was expressed that the draft articles should not take the form of a draft convention. An international convention might create unnecessarily rigid rules. One suggestion was to adopt a code of State responsibility that would be similar to a convention by its content while resembling a General Assembly declaration in its binding character. Support was also expressed for the Special Rapporteur's proposal that the question of the form of the draft articles should be deferred.

2. State crime

110. Divergent views were expressed regarding the inclusion of the notion of "crimes" in article 19 as well as the distinction between crimes and delicts. According to one view, State "crimes" should not be included in article 19, inasmuch as that concept did not have a basis in State practice or judicial decisions. International law did not recognize that States could be subjects of criminal responsibility, nor did any mechanism exist to enforce such responsibility. There was no reason, moreover, to include a legal concept which the international community was not yet prepared to accept. It was also unrealistic to introduce the concept of State crime, since the international community was made up of States with equal sovereignty. Furthermore, it was difficult to comprehend that a State that included people in a collective sense could be indicted. Not only had the distinction between "international crimes" and "delicts as internationally wrongful acts" become increasingly attenuated in the draft articles, as far as consequences were concerned, but the concept itself fitted uneasily into a set of secondary rules. Moreover, it was noted that the inclusion of the distinction would delay the Commission's work and had contributed to the doubts expressed as to the advisability of drawing up an international treaty before establishing guidelines or guides to practice. Reservations were also expressed regarding the terminology used in distinguishing between international crimes and delicts. That terminology, which had been taken from penal law, did not adequately describe the different categories of wrongful acts under international law. The remark was made that the best way forward in international law was to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings were called to account for such behaviour. The efforts to establish an International Criminal Court were referred to in this regard.

111. According to another view, the notion of State crime, as expressed in article 19 of the draft, was fundamental. Together with other notions already entrenched in international law, such as those of collective security and *jus cogens*, the notion of State crime constituted one of the pillars for the creation of an international public order and was firmly rooted in the public conscience as a reality which could not be ignored by the law. Furthermore, the distinction between international crimes and delicts existed in law, not only in terms of doctrine but in terms of the sociology of international relations. The international criminalization of "exceptionally serious wrongful acts" was thus intended to strengthen the notion of international public order and to preserve the highest values of humanity. The distinction also took into account the evolution of international society, which was now based on solidarity between States while at the same time reflecting their wish to respond collectively to a violation of society's common values. To abandon such a hierarchy of breaches of international obligations, as had been proposed, would be to disregard that need and to return to the traditional bilateralist approach to the law of international responsibility, which had been concerned solely with repairing the damage suffered by a State as a result of a breach of a primary rule of international law.

112. The view was also expressed that State responsibility was neither criminal nor delictual but international. Any comparison with the criminal responsibility of natural or legal persons under internal law could be misleading. The term "international crime" merely denoted the existence of a special scheme of responsibility with respect to the ordinary regime. The remark was made that, while it was not essential to use the terminology "delicts" and "crimes" to distinguish between wrongful acts and exceptionally serious wrongful acts, a unified regime on responsibility would make it impossible to guarantee that certain particularly serious consequences arose solely and exclusively from the breach of norms protecting the fundamental interests of the international community. It was noted further that the use of the term "crime" had generated problems deriving from

its domestic law connotations. In this connection it was observed that, if there was any real danger of confusion, the use of an alternative expression, such as "exceptionally serious wrongful act", could be envisaged. As to the term "delict", the view was expressed that it lacked a generally accepted significance and, in that sense, its use was perhaps not indispensable. It did, however, provide the necessary contradistinction to "crime" and, were the latter term to be retained, there would be no option but to retain the term "delict" as well. In that context, of the five possible approaches suggested by the Special Rapporteur in relation to the international crimes of States, a preference was expressed for the second, which replaced the expression "international crimes" with "exceptionally serious wrongful acts". Such a solution would avoid the connotations of domestic criminal law. Indeed, some legal codes could not provide for the criminal responsibility of a State, inasmuch as they did not even have provision for the criminal responsibility of legal persons generally.

113. It was observed that, whichever term was selected, it was essential to clarify the legal consequences arising from the violation of the two categories of rules and to determine the degrees of responsibility in each case, in order to establish an objective criterion based not on the damage or blame (*dolus* or *culpa*), but rather on the magnitude of the wrongful act and its effects. It was suggested further that the Commission should consider whether different regimes of international responsibility should be applied, depending on the seriousness of the breach of the international obligation, whether punitive reparations were to be allowed, how claims by States not directly affected were to be dealt with and the relationship between the regime of international responsibility and the United Nations collective security system. However, it was noted that while the Commission would continue to take an "objective responsibility approach" and positive law certainly drew distinctions between certain rights and obligations, such distinctions did not always have to entail automatic distinctions in the consequences, particularly with regard to reparation.

114. It was also observed that the category of crimes might be defined in other ways, for example, by reference to the existence of some specific system for their investigation and enforcement or to their substantive consequences. On the other hand, it was noted that the fact that the Commission had conducted its consideration of the matter not on the basis of the notion of "exceptionally serious wrongful acts" but, rather, on the basis of the specific characteristics of obligations *erga omnes* and obligations arising from peremptory norms (*jus cogens*) and, within the latter category, of "crimes", might be more relevant and useful for the structuring of the regime on international State responsibility.

115. The comment was made that the Commission should address the question of whether there was a hierarchy of international obligations, taking into consideration developments in international law, particularly with respect to *jus cogens* rules and *erga omnes* obligations. In that context, it was observed that while the latter related concepts were much broader notions, "State crimes" were more serious than acts violating rules with a *jus cogens* character. Furthermore, the rules relating to State crimes were not subject to any exception. Violations of *jus cogens*, meanwhile, formed a narrower category than acts contravening obligations *erga omnes*. "State crimes" could therefore not be replaced by either of the other two notions. Therefore, it was proposed that the systematic development of the key notions of obligations *erga omnes* and peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligations would resolve the contradiction created by article 19.

3. Requirement of damage

116. It was observed that there was no requirement of damage for a State to incur responsibility for an internationally wrongful act. Questions of damage or fault had been referred to the primary rules and should not be included in article 1. Their exclusion, however, could have a significant impact on the activation of the mechanism of responsibility. Consequently, the remark was made that it might be advisable to review article 1, bearing in mind the definition of "injured State" that might be adopted and the degrees of responsibility that might eventually be established in the draft articles. According to another view, the existence of harm was an indispensable element for triggering State responsibility and therefore the idea that a failure to fulfil obligations was sufficient was subject to criticism.

4. Attribution

117. In response to the Commission's question in paragraph 35 of its report, some delegations observed that all conduct of an organ of a State was attributable to that State under article 5 of the draft articles, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct. It was noted further that the same principle applied even where such acts were committed by the organ *ultra vires*. The remark was made that there was no relationship, as the terms used in the

question might suggest, between whether an act was attributable to a State and whether the State enjoyed immunity from the jurisdiction of foreign courts. Furthermore, as a practical matter, the distinction between the two types of acts was extremely difficult to draw and could considerably restrict the possibility of a State being held responsible for committing an internationally wrongful act. Moreover, no importance was attached to that distinction in international practice and jurisprudence. The comment was made that the issue might also have to be considered further from the standpoint of jurisdictional immunities and diplomatic protection.

118. As to the structure of chapter II of Part One of the draft articles, it was remarked that the draft, and specifically draft article 9, was deficient in terms of consistency and symmetry of language. Furthermore, the relevant draft articles (arts. 5–10) distinguished between conduct of the organ of the State acting in that capacity and conduct by persons, entities or organs of another State involving the exercise of elements of governmental authority of the State. Neither formulation was entirely free of ambiguity and the former, in particular, was potentially problematic since the attribution of one and the same type of conduct to the State might well vary in accordance with a given State's definition of "organ". In the latter regard, reference was made to the deletion of the phrase "under the internal law of that State" after the words "any State organ having that status" in draft article 5. It was observed that even though there might be a justifiable need to ensure that a State did not evade its responsibility through restrictive qualifications based on its domestic laws, the mere deletion of the reference to that law would not resolve the problem. Instead, it would present difficulties, since it was precisely internal law that defined what was considered a State organ. Hence the view was expressed that it was inappropriate to delete the phrase in question, since internal law was of primary importance in defining the organs of a State and its definition could cover both practice and customs. According to a different view, while there was no doubt that internal law would be relevant in certain circumstances, it was not always decisive, and it might be better to refer to internal law in the commentary rather than in the body of the draft articles. The view was also expressed that the responsibility of international organizations and of States for the acts of international organizations should not be included in the current draft articles, since that subject had its own special characteristics.

5. Circumstances precluding wrongfulness

119. It was observed that "circumstances precluding wrongfulness" should not be revisited in the draft articles, as the concept fitted uneasily into a set of secondary rules. Hence, consideration of any legal consequences flowing from State conduct, notwithstanding the existence of circumstances precluding the wrongfulness of that conduct, was clearly beyond the scope of the draft articles on State responsibility, which were predicated on there having been wrongful State conduct in the first place. A further remark was made that the preclusion of the wrongfulness of an act should not in all circumstances preclude compensation for damage caused by that act. As to the preclusion of wrongfulness in the context of countermeasures, the comment was made that it could not be claimed, as had been done in draft article 30, that the wrongfulness of an act of a State was precluded if the act was in response to another wrongful act committed by a wrongdoing State, since that would subvert the system of rules which the Commission was attempting to establish in the field of State responsibility. It was suggested that the Commission should carefully review article 30 and Part Two, chapter III, to ensure that any coercive measure that might be included in the draft articles strictly conformed to the international legal order in force.

6. Countermeasures

120. The remark was made that it was not necessary to draft provisions on countermeasures, which could only be tolerated under international law as an extreme remedy to be taken only in exceptional cases. It was further noted that while the right of States to take countermeasures in response to unlawful acts was permissible under customary international law, the desirability of providing a legal regime for countermeasures was questionable because of the complexity of the issues involved. In this regard, the view was expressed that article 50 did not reflect State practice or customary international law. Moreover, it was noted that the use of countermeasures favoured more powerful States and would potentially undermine any system based on equality and justice. Therefore, the observation was made that a countermeasures regime might warrant a specific study by the Commission, but not as part of the law of responsibility. Alternatively, the view was expressed that the provisions on countermeasures would find their proper place in the articles, since strictly speaking they were not considered a right of an injured State but one of the circumstances precluding wrongfulness, and were a corollary

to the settlement of disputes relating to the exigency of responsibility.

121. With regard to their content, it was noted that, given the lack of an effective, centralized system of coercion, it was inconceivable that an injured State should be prevented from taking countermeasures. In this connection, the comment was made that only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they had suffered harm. However, in order to prevent abuses, it would be prudent for the Commission not only to clarify the rules of customary international law, but also to develop clear rules limiting the circumstances under which States could resort to countermeasures. The following remarks were made in this regard: the application of countermeasures should not adversely affect the rights of third States; the inclusion in the draft articles of an obligation on the part of the injured State to negotiate prior to taking countermeasures appeared to be appropriate; in the meantime, the injured State should confine itself to taking such interim measures as seemed necessary to protect its rights; and the failure of negotiations or of any other peaceful dispute settlement procedure did not entitle the injured State to resort to countermeasures as it saw fit. It was also noted that the interests of the international community required that certain categories of countermeasures be prohibited. The suggestion was made that the Commission should examine the issue further with reference to the recent practice of States, and that it should consider the measures adopted in recent years against "pariah" States which were guilty of violating the fundamental norms of international law. While it was noted that it might be useful for the Commission to also consider the relationship between countermeasures and resort to third-party dispute settlement procedures, which should not necessarily preclude countermeasures, it was pointed out that it might not be practicable to include detailed provisions in that regard.

7. Injured State

122. It was observed that the identification of an injured State pursuant to article 40 was vital in determining the right to claim remedies against the wrongdoing State, including legitimate countermeasures. According to one view, while the term "injured State" in article 40 was ambiguous, the Commission would be wrong to re-examine it only on the basis of the notion of *jus cogens*. The view was also expressed that as currently drafted the provision did not offer a satisfactory response to breaches of obligations *erga omnes*, owing to its inconsistency with article 60 of the 1969 Vienna Convention on the Law of Treaties, which provided more restrictive rules. According to another view, it was important to clarify the notion of injured State as contained in draft article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and State crimes. Hence, it was suggested that the Commission review and clarify the terminology used in regard to the definition of "injured State".

123. The comment was made that it was important to recognize that designating all States as "injured" and granting them a full range of responses to "crimes", including the right to take countermeasures, could lead to abuse. In this regard, it was proposed that the right of response should be given only to States that were directly affected, and that responses to violations of community obligations should be granted according to the proximity of a State to the breach of which it was a victim. It was suggested that the Commission should consider the latter issue and propose objective criteria. In this regard, the point was made that an objective determination of the existence of a breach of a fundamental norm should not be left to the discretion of the State which claimed to be injured. Instead, a suggestion was made that the International Court of Justice was the body which offered the best guarantee of impartiality and which was capable of taking a fully informed decision on the existence of such a breach. Thus a State would first have to show that the right alleged to have been violated was a primary rule in international law and that the parties were bound by that primary rule, whether established by treaty or by customary international law. In the case of the latter, reference was made to the difficulty of determining what mechanisms might be applied when particular provisions were violated, since the choice of enforcement or dispute settlement procedures differed between treaty and customary international law. It was suggested that the general principle seemed to be that, where a multilateral or regional convention had mechanisms for reacting against violations, those mechanisms took priority. Therefore the recommendation was made that the Commission clarify those issues and that it consider the desirability of drafting separate provisions dealing with the two sources of international law rather than combining them.

8. Reparation

124. The issue of reparation was raised in the context of the Commission's question, in paragraph 36 of its report, as to the appropriate balance to be struck in Part Two of the draft

articles between the elaboration of general principles and of more detailed provisions. It was noted in this regard that the approach in the current draft was prone to weaknesses of both excessive generality and misplaced specificity. From the point of view of clarity of the law, detailed regulations might be preferable. However, detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission's work. A preference was expressed for emphasizing general principles rather than very detailed and specific provisions, so that the relatively complex subject matter of reparation and compensation could be dealt with in a satisfactory way while allowing enough flexibility for specific cases.

125. According to another view, it was especially important to establish principles concerning the consequences of an internationally wrongful act that would be sufficiently acceptable. Hence more detailed provisions would ensure greater legal security in so sensitive an area as that of international responsibility. Furthermore, chapter II of Part Two would be improved if the content of the articles on compensation and guarantees of non-repetition was broadened by incorporating, in particular, certain norms of customary international law which had entered into international jurisprudence. It was also noted that since compensation, in practice at least, was the most relevant element in making reparation for the injury caused, more detailed provisions on compensation, in particular with regard to the assessment of pecuniary damage, including interest and loss of profits, would be preferable. The comment was also made that although the basic principle established in article 42 was one of full reparation, both article 42 itself and subsequent articles suggested a change in that principle. In this regard, it was observed that article 42, paragraph 2, could be interpreted as a deviation from the full reparation standard and opened the way for abuse by wrongdoing States. Similarly, if compensation was to be the main remedy resorted to following an internationally wrongful act, article 44 was too brief, particularly when contrasted with the more detailed provisions in articles 45 and 46. It was also suggested that, in accordance with the principle of full reparation, the payment of interest should be the basic and general rule for compensation.

9. Dispute settlement

126. With regard to the dispute settlement mechanism envisaged in the draft articles, the comment was made that its effectiveness should not be prejudged on the grounds that States would not accept binding settlement of disputes in that field. Nor could the objection be raised that it would be a specialized system, since there were special regimes for the law of the sea or in the field covered by the International Criminal Court. It was further suggested that the final content of the provisions on the settlement of disputes would largely depend on the manner in which the draft articles were adopted. While the view was expressed that a convention on international State responsibility for wrongful acts should include dispute settlement provisions, according to another view, the provisions on dispute settlement seemed misplaced since there was no reason to single out disputes connected with State responsibility by applying an ad hoc settlement mechanism to them. There were rarely any disputes about responsibility alone, but rather substantive disputes which had consequences for responsibility, and hence it would be better to rely on general international law. In this regard, it was suggested that Part Three of the draft articles should be given the form of an optional protocol, if it could not be deleted.

10. Relationship with other rules

127. Concerning the relationship between the draft articles and other rules of international law, the remark was made that the draft should continue to respect *lex specialis*. In this connection, it was also important to respect the parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention. It was observed that the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle. Likewise, support was expressed for the notion that where specific treaty regimes provided their own framework for responsibility of States, that framework would ordinarily prevail, regardless of whether the draft articles took the form of a convention or of a declaration of principles.

E. Nationality in relation to the succession of States

1. Nationality of legal persons in relation to the succession of States

128. Several delegations shared the Commission's view that, as the definition of the topic stood, the issues involved in the second part dealing with the nationality of legal

persons were too specific and the practical need for their solution was not evident. It was felt that the low incidence of legal disputes relating to that question in recent cases of State succession showed that it was not a pressing issue, and that in any case it was generally dealt with in the context of private rather than public international law. The point was also made that the future of the second part rested in the hands of Governments in a position to share their practical experience of State succession as it affected the nationality of legal persons; in the absence of comments in that regard, the Commission might do better to turn its attention to other issues. In this connection, a delegation from a country which had recently undergone a succession of States indicated it had not faced any practical problems as regards the nationality of legal persons.

129. Another such delegation, however, argued that problems of this nature had in fact arisen in the absence of relevant international rules and that therefore work on the second part of the topic was of utmost interest. This position received some support.

130. The first alternative approach considered by the Commission, namely, expanding the scope of the study beyond the context of the succession of States to the question of the nationality of legal persons in international law in general, was supported by some delegations, particularly insofar as the question would be addressed as a new topic. The view was expressed that, with countries becoming more and more interdependent economically and the volume of investments growing, the time had come to rethink the traditional approach to the matter. Others did not regard this option as appropriate or feasible, in particular owing to the numerous practical difficulties in the light of the diversity of relevant national laws. It was also felt that such work would considerably overlap with the topic of diplomatic protection.

131. As regards the second alternative, which consisted in keeping the study within the context of the succession of States but going beyond the problem of nationality to include other questions, some delegations expressed reservations in the light of the problem of the diversity of national laws on the subject. Others, however, supported this approach. In particular, there was the view that the Commission should prepare an instrument, perhaps in the form of a declaration, establishing basic principles for addressing the legal problems connected with the nationality and legal capacity of legal entities affected by a succession of States, and possibly including a savings clause confirming the preservation of the property rights of such entities.

132. There was also a view that it might be useful to draw upon elements of both above-mentioned options as regards the future work on the second part of the topic. The suggestion was made to consider the question of the nationality of legal persons before examining it in the context of the succession of States, or even to begin with a study of the concept of "legal persons" as such.

2. Nationality of natural persons in relation to the succession of States

133. Some delegations commented on the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading at its forty-ninth session. Such work was considered both timely and useful in providing solutions to the problems faced by States. Support was expressed for the general approach adopted by the Commission.

134. As regards the final form of the draft articles, some preferred a declaration, others a convention.

135. It was considered important that the draft articles should not encourage dual nationality. The inclusion in the text of the obligation of States to prevent statelessness was welcomed.

136. Concerning the right of option, the view was expressed that it was a powerful tool for avoiding "grey areas" of competing jurisdictions and that it should be applied to the maximum extent possible. There was also the view, however, that the rights of States should not be reduced excessively to the benefit of the rights of individuals and that States should retain control over the attribution of nationality. In this connection, the point was made that article 10, paragraph 4, was too restrictive.

137. There was a proposal to define the expression "succession of States" in article 2 (a) as "the replacement of one State by another in the responsibility for the administration of territory and its population". Further suggestions on terminology were to harmonize, for the sake of consistency, the text of draft articles 10 and 18 and to use the expression "genuine and effective link" in both, as well as to clarify concepts such as "appropriate legal connection" and "reasonable time limit".

138. As regards the general provisions in Part I, support was expressed for the presumption of nationality in article 4, although it was added that such presumption was subject to any specific arrangements that might be reached by the parties concerned. There were divergent views on the need for the inclusion of article 11. The point was made that,

while the principle of family unity was an important one, habitual residence ought to be considered the most important criterion in determining nationality. It was felt that the issues raised in article 13 were not directly related to the problem of nationality. Support was, however, expressed for the provisions in articles 14 and 15. There was a view that article 18, paragraph 1, overemphasized the principle of effective nationality which had no basis in international law.

139. In respect of Part II, the view was expressed that situations of decolonization should also be addressed, or that, at least, the Commission should specify that the established regime applied *mutatis mutandis* to such situations.

140. The point was made that, in the case of the dissolution of a federal State, the criterion of the nationality of the former constituent unit of the federation should take precedence over that of habitual residence, as demonstrated by recent State practice.

141. Support was expressed for the Commission's approach to only address successions of States occurring in conformity with international law.

F. Reservations to treaties

1. General comments

142. Several delegations reiterated the view that the Vienna Convention on the Law of Treaties established a workable legal regime for reservations applicable to all types of treaties. A special regime of human rights treaties would not make it less universal although it might be useful to consider further an ad hoc reservations regime for human rights treaties if it needed to be adapted to the aims and characteristics of such treaties. This Vienna regime did not require a major revision or any fundamental modification but its possible gaps and ambiguities, especially in the case of inadmissible reservations, needed to be filled and clarified in an exercise of progressive development of international law. The guidelines on the definition of reservations and interpretative declarations seemed therefore useful.

143. It was also noted that entering reservations was a sovereign right of States ensuring the universality of multilateral treaties.

144. Other delegations, while admitting that the work of the Commission on the topic could serve the pressing needs of Governments on their daily business, expressed some reservations about the definitional exercise to the extent that it did not touch questions of legal "substances" on which the Commission had embarked. They advocated some caution on the question of interpretative declarations which might not constitute a separate legal category but merely be a convenient "*porte-manteau*" for statements that were not reservations. They also wondered whether the legal effects of interpretative declarations were an essential part of the Commission's study of the topic.

145. Some delegations felt that, although it was important to undertake a thorough analysis of questions pertaining to reservations, going too much into detail in relation to issues which appeared to be of a more theoretical than a practical interest might result in losing sight of the essential goal, which was the Guide to practice. It was pointed out that the definition of reservations raised various political and legal questions since it raised very fine relative distinctions between reservations and other unilateral statements.

146. According to another view, the subject of reservations to treaties seemed to have attracted a growing interest among States as the recent work in the Council of Europe and the Asian-African Legal Consultative Committee showed. Consequently, an authoritative user's guide prepared by the Commission would be of great practical value.

147. The view was also expressed that none of the three Vienna Conventions gave a comprehensive definition of reservations. In formulating such a definition, the restrictive or "limitative" nature of the reservation should be stressed and a comprehensive list of the moments at which reservations could be made should be established.

148. The consideration of reservations and interpretative declarations in parallel was also supported by several delegations. It was essential that the work of the Commission should provide easily understood guidelines clarifying the differences and similarities between these two notions. It was observed that a conditional interpretative declaration could only constitute a reservation if it was made at the right time and if it was not contrary to the object and the purpose of the treaty.

149. It was also observed that some reservations were so general that it was impossible to reconcile the scope of the reservations with the object and purpose of the treaty concerned or to assess the practical impact of the reservation. This problem was particularly difficult in the case of human rights treaties when the objecting State would like to regard the reserving State as party to the treaty without the reservation, departing thus from the usual effect of the Vienna regime whereby the effect of an objection to a reservation was that the provisions to which the reservation related did not apply between the two States to the extent of the reservations. This "severability" doctrine in human rights

treaties had been applied by a number of countries and it was hoped that it would be reflected in the next report of the Special Rapporteur. However, according to another view, there was little State practice to support the severability doctrine.

150. The view was expressed that although the Vienna regime did not provide any mechanism for assessing whether a reservation was incompatible with the object or purpose of a treaty, this was within the competence of States parties to the treaty and not of treaty bodies, which did not have the power to make determinations regarding the validity or admissibility of particular reservations unless explicitly mandated to do so under the treaty in question. The decision to withdraw or revise a reservation should also lie with the State.

151. It was observed that the Vienna Conventions were unclear concerning the legal aspects of inadmissible reservations, particularly those raised in connection with human rights treaties.

152. It was also observed that the incompatibility of a reservation with the object and purpose of a treaty should be decided in an objective way according to more clearly defined criteria; to leave this matter entirely in the hands of States parties was not always satisfactory and sometimes could be confusing, although it was the exclusive responsibility of the State itself to rectify the defect in the expression of its consent to be bound. This was a particularly important issue in the case of rules of *jus cogens* since reservations would clash with a pre-existing rule which the treaty had embodied. Moreover, the issue was raised as to whether in the case of a prohibited reservation States had to object in order to prevent it from being effective. State practice differed in the field and it was hoped that the Special Rapporteur and the Commission would try to find solutions to that complex problem.

153. It was pointed out that a guide to practice offering practical solutions would necessarily be of a residual nature and would leave the Vienna system intact, becoming a well respected code on reservations.

154. It was observed that a conditional interpretative declaration could only constitute a reservation if it was made at the right time and was authorized by the treaty or was not contrary to its object and purpose. On the other hand, the view was expressed that the interpretation given to the treaty by interpretative declarations should be plausible; otherwise, it would amount to an amendment. The view was also expressed that interpretative declarations often provided the only way for States to subscribe to a general multilateral instrument and should be considered in the light of the specific cultures which influenced the legal regimes of nations. It was also noted that the Commission in its future work on reservations should consider the matter of the obligations of depositaries.

2. Comments on individual guidelines

155. Several delegations welcomed the draft guidelines on definition of reservations and interpretative declarations. It was noted that the fundamental characteristic of reservations was their purpose of excluding or modifying the legal effects of certain provisions of a treaty, while the purpose of interpretative declarations was to clarify the meaning and scope of a treaty or some of its provisions. Many delegations welcomed draft guideline 1.1 (**Definition of reservations**) as combining all the elements contained in the three Vienna Conventions. According to one view, the main purpose was to draw a clear distinction between reservations and other unilateral statements. This definition was well entrenched and was also of great practical importance to States in determining the admissibility of a reservation in State practice, although according to this view it still left room for some degree of uncertainty.

156. It was observed that, as regards the **object of reservations** (draft guideline 1.1.1), if a reservation was too general, as it had become a more common practice recently, especially in the domain of human rights, it could give rise to many difficulties and put into question the will of the reserving State to implement the treaty effectively. Certain delegations endorsed the Commission's intention to re-examine that guideline in the light of the discussion on interpretative declarations, all the more so since the text seemed to be too vague. In order to avoid a possible confusion with certain types of interpretative declarations, reference could be made to the object of modifying or excluding the legal effects of the treaty. Another delegation expressed its concern that the risk of across-the-board reservations would increase substantially with this draft guideline.

157. With regard to draft guideline 1.1.2 (**Instances in which reservations may be formulated**), delegations agreed that it should include all situations envisaged in article 2 of the 1969 Vienna Convention.

158. However, it was also observed that the purpose was not to provide an exhaustive enumeration of all moments at which reservations could be made, as for instance the notification of succession.

159. With respect to draft guideline 1.1.3 (**Reservations having territorial scope**), one delegation drew attention to the fact that the formulation of reservations upon succession was limited to situations where the devolution of the treaty to the successor State did not operate automatically and the notification of succession had rather a constitutive and not a declaratory character. But in cases of "automatic" succession, the successor State became a party to treaty "modified" by the reservation of its predecessor and did not have the right to make new reservations.

160. Another delegation supported the view that upheld the successor State's right to repeal a reservation made by the predecessor State or to make a new reservation upon its notification of succession; since the successor State becomes party to a treaty as from the date of succession, a considerable time might often elapse between these two dates. Another delegation stressed the importance of maintaining the deadlines for the entering of reservations.

161. The view was expressed that unilateral statements by which States proposed to exclude the application of a treaty or some of its provisions to a territory constituted indeed reservations and reflected established practice. Such reservations could be formulated even if not expressly provided for in the treaty to which they related. It was pointed out that the possibility of a State formulating a reservation aimed at limiting the application of the treaty or the legal effect of some of its provisions in regard to a territory should be included.

162. Although several delegations agreed with the substance of the Commission's findings, they called for careful examination of the question of the instance in which that kind of reservation could be made. Moreover, the question of "movable treaty frontiers" was recalled especially in the context of territorial cessions. Since State practice did not give support to the idea of reservations aimed at excluding the application of the rule of movable treaty frontiers, that question should be further considered by the Commission when it addressed the question of reservations to situations of State succession.

163. A view was expressed that the Commission should clarify whether a reservation formulated when notifying territorial application of a treaty would also be admissible if the expansion of the territorial application of the treaty was "automatic", as it was in the case of a transfer of part of a territory between States.

164. In connection with draft guideline 1.1.4 (**Reservations formulated when notifying territorial application**), it was also observed that it might be necessary to limit the draft guidelines to "colonial" situations so they would include only those territories which were subject to the jurisdiction of the reserving State. If the Guide to practice reflected well-established practice it might then not include the uncommon practice of excluding all or part of the State's own territory.

165. A view was expressed that draft guideline 1.1.5, although correct, was not necessarily needed. Draft guideline 1.1.6 seemed to be rather unbalanced and even superfluous, merely restating the substance of the concept of reservation. It was also pointed out that too much work should not be devoted to "extensive reservations". Some delegations agreed with the text of draft guidelines 1.1.5 and 1.1.6 while admitting that they required further clarification.

166. Several delegations thought that unilateral statements relating to non-recognition or substitution should be given further consideration, while according to another view statements of non-recognition were governed by the rules on recognition of States.

167. Many delegations shared the view that the unilateral character of the reservation did not exclude the possibility of States to formulate reservations jointly (1.1.7 **Reservations formulated jointly**). Nevertheless, the question arose whether the withdrawal by one of the States of its reservation give rise to effects for the other States which had formulated it.

168. Moreover, it was noted that the Commission had taken an innovative approach to reservations formulated jointly since it was foreseeable that there would be frequent recourse to such reservations in the near future, especially as a result of the participation of the European Union in an increasing number of multilateral treaties. That approach would also allow the Commission to innovate in the case of interpretative declarations which were not mentioned in the new Conventions.

169. In respect to draft guideline without a title or number for the time being, delegations concurred with the view that a definition of a unilateral statement as a reservation did not render it admissible or valid, or prejudge its admissibility. Only when such a definition has been established would the question of the act's validity be settled, taking into account its legal scope and effect. It was thus useful to clarify and specify the scope of the entire set of draft guidelines adopted thus far. According to one view, the question of admissibility should be linked to the definition of the reservation.

170. Many delegations were of the view that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations. However, it was also observed that much

depended on this specific formulation as there might be cases where they could be considered as modifying the legal effects of certain provisions of a treaty. The Commission should examine State practice in that regard.

171. It was observed that the fact that a State or an international organization expressed its willingness to extend its obligations beyond those stipulated by a treaty did not modify the legal effects of any obligation arising under that treaty. Such commitments did not constitute reservations. However, it was further observed that the situation would be different in the case of a State which sought to increase its rights under a treaty. It was important to distinguish between treaty law and customary law; while a State could not modify customary international law to its own benefit by formulating a reservation to a treaty codifying that law, it might be possible to do so in the case of treaty law. The Commission might therefore consider that question as well as the options available to other States parties in such a situation. In such cases, the term "reservation" would not be appropriate, especially in view of the consequences of the application of the reservations regime.

172. It was also observed that such statements in which a State party designed to increase its rights sometimes constituted a derogation from a State's commitments limiting the obligations of their author and could therefore constitute a reservation.

173. According to another view, such statements were merely proposals or offers by a State for amending a treaty and could become binding only after their acceptance by other parties in accordance with the provisions of the treaty or through a "parallel" treaty relationship in addition to the primary treaty.

174. It was also observed that these statements might constitute unilateral acts of State and it was noted that any binding force of such declarations derived not from the treaty itself but from principles of general international law governing unilateral legal acts.

G. Other decisions and conclusions of the Commission

1. General comments

175. Several delegations welcomed the Commission's initiatives to promote greater efficiency in its work and expressed their support for enhancement of the mutually beneficial cooperation between the Commission and other bodies, especially the Sixth Committee. The view was also expressed that the Commission should maintain close relations with the International Court of Justice, whose decisions and advisory opinions played a fundamental role in determining the existence of customary rules and principles of international law. The contribution to codification and doctrine made by regional bodies was acknowledged.

176. The importance of promoting international law through the International Law Commission seminars, particularly for students from developing countries, which should be equitably represented, was also underscored.

177. It was observed that the codification exercise would be effective if its results were embodied in multilateral conventions. Although the Commission seemed to have focused recently more on the formation of principles, guidelines or model rules whenever appropriate, it should not lose sight of the fact that codification should be aimed at the elaboration and systematization of customary rules in the form of legally binding international conventions.

178. The hope was expressed that the Commission would be able to make progress on the topics on its current agenda, especially the topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and nationality and succession of States.

179. It was also announced that the complete series of Gilberto Amado Memorial Lectures had recently been published to mark the Commission's fiftieth anniversary and that the entire series would be made available on the Internet.

180. A number of delegations expressed the wish that advance copies of the forthcoming reports of the Commission could be made available at the ILC Web site, thus facilitating the analytical work of Governments.

181. Reference with appreciation was also made to the organization of the seminar commemorating the Commission's fiftieth anniversary as well as to the publications *Making Better International Law: The International Law Commission at 50*, and *Analytical Guide to the Work of the International Law Commission*.

182. It was agreed that the Commission had maintained in its work a correct balance between progressive development and codification. It was suggested that Special Rapporteurs should present to the Sixth Committee their ideas on how the Committee's examination of the Commission's report might be best conducted. Moreover, an itemization of the principal issues involved in each topic might provide a useful framework for a fruitful discussion.

2. Long-term programme of work

183. Many delegations supported the criteria for selecting the topics to be included in the long-term programme of work and felt that the Commission should not limit itself to traditional topics but should also consider questions pertaining to recent State practice. It was also observed that each of the topics proposed seemed clear and well focused. They should thus be easily completed within a few years.

184. Delegations welcomed the inclusion of topics such as: responsibility of international organizations, effects of armed conflicts on treaties (focusing on international rather than domestic conflicts), expulsion of aliens, and shared natural resources.

185. Regarding the future of the topic of international liability, the view was expressed that the Commission should follow the second part of the study focusing on principles of civil liability (including liability of non-State actors for transboundary physical harm) and on a State's international liability and the specific relationship between the two. Such an approach would be more germane to the realities of international life which were increasingly shaped, especially in the economic sphere, by corporations and even individuals.

186. In relation to the thought that the Commission should take up issues related to international environmental law, the idea was also expressed that the term "transboundary resources" would be preferable to "shared natural resources". Thus, the Commission could study the issue of groundwater and transboundary deposits.

3. The question of split sessions

187. A view was expressed that the 1998 split session had been a success since the Commission had completed both the set of 17 draft articles on prevention of transboundary damage from hazardous activities and the draft guidelines on reservations to treaties and had offered the possibility to legal advisers of permanent missions at New York to observe the work of the Commission and to meet its members. According to this view, it was regrettable that financial constraints made it impossible for the Commission to continue to meet in split session and it was hoped that the future budget would provide funding to allow this practice to be resumed.

188. The suggestion was made that, in future, the Commission should hold 10 meetings per week (instead of 8), thereby shortening the total length of its sessions by one week for every six.

189. Some delegations supported the Commission's decision to hold a single session in Geneva in 1999 and another split session in 2000. In their view, the Commission should be allowed to decide on its schedule of work, which would make it more efficient and effective.

United Nations A/CN.4/497

General Assembly

Distr.: General
8 March 1999

Original: English

International Law Commission
Fifty-first session
Geneva, 3 May–23 July 1999

Nationality in relation to the succession of States

Memorandum by the Secretariat

Contents

		Paragraphs	Page
I.	Introduction	1–4	3
II.	General observations of States on the draft articles	5–21	3
	A. General approach	5–9	3
	B. Human rights considerations	10–12	5
	C. Form of the future instrument	13–17	5
	D. Structure of the draft articles	18–21	6
III.	Observations relating to specific articles	22–158	7
	Preamble	22	7
	Part I. General provisions	23–116	7
	Article 1. Right to a nationality	23–27	7
	Article 2. Use of terms	28–31	8
	Article 3. Prevention of statelessness	32–35	9
	Article 4. Presumption of nationality	36–43	9
	Article 5. Legislation concerning nationality and other connected issues	44–45	11
	Article 6. Effective date	46–48	11
	Article 7. Attribution of nationality to persons concerned having their habitual residence in another State	49–55	12

99-06574 (E) 250399

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality	56–58	13
Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State	59–61	13
Article 10. Respect for the will of persons concerned	62–73	14
Article 11. Unity of a family	74–81	16
Article 12. Child born after the succession of States	82–86	17
Article 13. Status of habitual residents	87–91	18
Article 14. Non-discrimination	92–98	19
Article 15. Prohibition of arbitrary decisions concerning nationality issues	99–100	20
Article 16. Procedures relating to nationality issues	101–102	20
Article 17. Exchange of information, consultation and negotiation	103–104	21
Article 18. Other States	105–116	21
Part II. Provisions relating to specific categories of succession of States	117–158	23
Article 19. Application of Part II	124–128	24
Section 1. Transfer of part of the territory	129–133	25
Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State	129–133	25
Section 2. Unification of States	134	27
Article 21. Attribution of the nationality of the successor State	134	27
Section 3. Dissolution of a State	135–143	27
Article 22. Attribution of the nationality of the successor State	135–138	27
Article 23. Granting of the right of option by the successor States	139–143	28
Section 4. Separation of part or parts of the territory	144–158	29
Article 24. Attribution of the nationality of the successor State	144–146	29
Article 25. Withdrawal of the nationality of the predecessor State	147–150	29
Article 26. Granting of the right of option by the predecessor and the successor States	151–154	30
Article 27. Cases of succession of States covered by the present draft articles	155–158	30

I. Introduction

1. At its forty-ninth session, the International Law Commission adopted on first reading a draft preamble and a set of 27 draft articles on Nationality of natural persons in relation to the succession of States with commentaries thereto.[1] In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

2. Member States expressed their views on the draft in the Sixth Committee during the fifty-second and fifty-third sessions[2] of the General Assembly. Summaries of their observations are contained in the topical summaries of the discussion held in the Committee during those sessions.[3]

3. On 15 December 1997, the General Assembly adopted resolution 52/156, entitled "Report of the International Law Commission on the work of its forty-ninth session". In paragraph 2 of that resolution, the Assembly drew the attention of Governments to the importance for the Commission of having their views on the draft articles, and urged them to submit their comments and observations in writing by 1 October 1998. Such written comments on the draft by Governments are contained in document A/CN.4/493 and Corr.1.[4]

4. The present memorandum contains an overview of the comments and observations of Governments, made either orally in the Sixth Committee or in writing. It follows the structure of the draft articles. Where appropriate, attention is drawn to diverging opinions of the members of the International Law Commission regarding specific articles as expressed during the adoption of the draft articles on first reading.

II. General observations of States on the draft articles

A. General approach

5. States generally welcomed the speedy adoption of the draft articles on first reading. Such work was considered both timely and useful in providing solutions to the problems faced by States.[5] The draft articles were considered to be a helpful supplement to the 1978

---

[1] The text of the draft articles with commentaries may be found in the report of the International Law Commission on the work of its forty-ninth session, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), chap. IV, sect. C.

[2] The following States expressed their views on the draft articles during the fifty-second and fifty-third sessions of the General Assembly: Algeria, Argentina, Bahrain, Bangladesh, Brazil, Cameroon, China, Costa Rica, Croatia, Czech Republic, Egypt, Finland (on behalf of the Nordic countries), France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Israel, Italy, Japan, Libyan Arab Jamahiriya, Malawi, Mexico, Netherlands, Pakistan, Portugal, Republic of Korea, Russian Federation, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay and Venezuela.

[3] A/CN.4/483, paras. 5–60, and A/CN.4/496, paras. 128–141.

[4] As at 1 March 1999 replies had been received from the following States (on the dates indicated): Argentina (13 November 1998); Brunei Darussalam (9 October 1998); Czech Republic (14 September 1998); Finland (on behalf of the Nordic countries, namely, Denmark, Iceland, Norway, Sweden and Finland) (29 September 1998); France (30 October 1998); Greece (1 September 1998); Guatemala (11 June 1998); Italy (26 October 1998); and Switzerland (27 November 1997).

[5] A/CN.4/483, para. 5; A/CN.4/496, para. 133.

Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[6]

6. It was recognized that the topic was a difficult one.[7] Reference was made, in particular, to diverging treaty regimes, the lack of clarity of relevant customary law, the limited jurisprudence on the subject and the variety of applicable laws.[8] It was observed, however, that the draft articles clarified a field which had in the past given rise to much controversy, both theoretical and practical, and that, although not all of the questions had been answered, their parameters and implications were now much clearer than before.[9]

7. Support was expressed for the general approach adopted by the Commission.[10] There was nevertheless the view that the draft was "interventionist", if not "dirigiste"; it was argued that States should not be placed under constraints and that sufficient flexibility should be preserved.[11] This comment was addressed in particular to the provisions relating to the right of option: it was felt that these problems should be settled by means of bilateral agreements.

8. There was also the view that the draft articles should focus more on the effects of the succession of States on the nationality of natural persons and less on the nationality of natural persons as such and that those provisions which were a matter of the general policy of States with regard to nationality or had no direct relationship with the question of the succession of States should be excluded from the draft.[12] Consequently, a title such as "Effects of the succession of States on the nationality of natural persons" or "Succession of States and nationality of natural persons" would be preferable.[13]

9. The question was raised whether the draft was to be categorized as codification of public international law or progressive development.[14] It was felt that, without putting into question the fact that attribution of nationality belonged to the realm of the internal competence of States, the draft articles established a series of basic principles on the topic, providing extensive codification of current customary international law reflecting the practice of States, doctrinal opinions and jurisprudence[15] and furnished States with guidelines for standardizing their internal rules and ensuring greater legal certainty.[16] There was also the view that, as is often the case with the drafts submitted by the Commission, the present draft articles were a combination of both existing rules of customary law and provisions aimed at developing international law. According to this view, the element of development of international law was an indispensable part of a draft purporting to cover the subject of nationality in relation to the succession of States in its entirety and to propose a legal regime more satisfactory than that which could be deduced from the already well-established principles of international law.[17]

---

[6] A/CN.4/493, comments by France.

[7] Ibid., comments by France and Italy.

[8] Ibid., comments by France.

[9] Ibid., comments by Switzerland.

[10] A/CN.4/496, para. 133.

[11] A/CN.4/493, comments by France; A/CN.4/496, para. 136.

[12] A/CN.4/493, comments by Greece.

[13] A/CN.4/483, para. 59.

[14] A/CN.4/493, comments by France (on the form that the draft articles should take).

[15] Ibid., comments by Argentina.

[16] Ibid., comments by Italy.

[17] Ibid., comments by Czech Republic (on the form that the draft articles should take).

B. Human rights considerations

10. The human rights approach adopted by the Commission received widespread support.[18] Several States commended the Commission for taking into account more recent trends in international law, particularly in regard to the international protection of human rights.[19]

11. It was felt that the Commission had struck an appropriate balance between the rights and interests of both individuals and States, taking also into consideration the interests of the international community.[20] Even those who considered that when emphasizing the rights and interests of both States and individuals the Commission had moved considerably beyond the traditional approach to the law of nationality stated that they had no difficulties in following the Commission on this path, provided that the balance between the interests of States and those of individuals was maintained.[21]

12. It was also observed, however, that the Commission should not, as regards the rights of individuals, go beyond its mandate on the topic and that care should be taken to ensure that the draft articles did not impose more stringent standards on States involved in a succession.[22]

C. Form of the future instrument

13. The Commission had submitted the present draft articles in the form of a draft declaration, without prejudice to the final decision on the form the draft articles should take.[23]

14. Most States favoured a declaration as the final form to be given to the draft articles. It was stressed that, if the purpose of the future instrument was to provide the States involved in a succession with a set of legal principles and at the same time with some recommendations to be followed by their legislators when drafting nationality laws, not only might the form of a declaration adopted by the General Assembly be sufficient for the achievement of this goal, it might even have some advantages, when compared to the rather rigid form of a convention, traditionally used for the finalization of the work of the Commission.[24] It was argued that a declaration: (a) would provide a more rapid, yet authoritative, response to the need for clear guidelines on the subject, without precluding the subsequent elaboration of a convention;[25] (b) could address a broader spectrum of issues than a convention establishing strict obligations for States;[26] and (c) if adopted by consensus, might have greater authority than a convention ratified by a small number of States. It was further observed that, should the draft take the form of a treaty, States concerned that were party to it prior to the succession would be bound by the text as a whole, while new States that emerged from the succession would be bound only by provisions reflecting customary

---

[18] A/CN.4/483, para. 7.

[19] A/CN.4/493, comments by Argentina and Finland (on behalf of the Nordic countries).

[20] A/CN.4/483, para. 7.

[21] A/CN.4/493, comments by the Czech Republic.

[22] A/CN.4/483, para. 7.

[23] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to the draft preamble, p. 24.

[24] A/CN.4/493, comments by the Czech Republic.

[25] Ibid., comments by Finland (on behalf of the Nordic countries).

[26] Ibid., comments by the Czech Republic.

rules, hence those contained in Part I of the draft articles, and, as a consequence, different rules would apply to the different actors involved in the same case of succession.[27]

15. On the other hand, some States expressed preference for the elaboration of a convention, which was the form taken by the previous work of the Commission on the topic of State succession.[28] It was also stressed that it would be problematic to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. Should a treaty form not be chosen, one of the goals of codification — the drafting of new conventions — would not be achieved. Furthermore, in such a case the rules enunciated in the draft were nevertheless likely to have legal effects even though they were not treaty rules.[29]

16. The view was also expressed that, as it stood, the text looked more like a draft convention and that there was even a certain "legal mimicry" on the part of the draft articles with respect to the 1978 and 1983 Vienna Conventions, which increased already existing doubts as to the final status of the text.[29]

17. Other options mentioned with respect to the final form of the draft articles included a set of guidelines for national legislation or model rules.[30]

D. Structure of the draft articles

18. The structure of the draft articles elicited favourable comments.[31] The idea of splitting the draft articles into two parts, the first stating general rules and the second containing optional rules applicable to each of the four situations of succession defined in the draft articles, received widespread support.[32]

19. The view was expressed that, although Part I might not be considered in its entirety as a simple reflection of existing law — it also included recommendations — the recommendatory nature of the text was much more evident in Part II, which was mainly intended to provide guidance or inspiration to the States involved in a succession in their efforts to resolve problems of nationality. It was felt that it was only wise to assume that States concerned might, by mutual agreement — whether explicit or even implicit — decide on a different technique of application of the provisions of Part I in a particular case of succession.[33]

20. However, it was observed that, if article 19 were interpreted *a contrario*, then Part I of the draft would consist of peremptory provisions; there was thus the suggestion to review all the articles in Part I of the draft to determine whether they all actually fell into that category.[34]

---

[27] A/CN.4/483, para. 57.

[28] Ibid., para. 58.

[29] A/CN.4/493, comments by France.

[30] A/CN.4/483, para. 58.

[31] Ibid., para. 6.

[32] A/CN.4/493, comments by Argentina, the Czech Republic and Switzerland.

[33] Ibid., comments by the Czech Republic.

[34] A/CN.4/483, para. 6; A/CN.4/493, comments by Switzerland.

21. It was also noted that, should the text ultimately take the form of a *treaty*, it was obvious that it would then be necessary to supplement it with provisions relating to the settlement of disputes.[35]

III. Observations relating to specific articles

Preamble

22. There were no specific comments or observations on the preamble as such.

Part I. General provisions

Article 1. Right to a nationality

23. It was considered that the right to a nationality in the context of a succession of States as embodied in article 1 constituted a fundamental rule of the draft which marked significant progress in the international protection of human rights and an improvement in the positive sense of the principle embodied in article 15 of the Universal Declaration of Human Rights.[36]

24. The Commission was further commended for going beyond the traditional approach to the right to a nationality as constituting mainly a positive formulation of the duty to avoid statelessness and not a right to any particular nationality, and having given such right a precise scope and applicability building on the fact that, in cases of State succession, the States concerned were easily identified.[37] It was also stressed that the issue here was not the right to a nationality *in abstracto*, but rather that right in the exclusive context of the succession of States. Moreover, the right to a nationality was clearly subject to the provisions of the draft articles which followed.[38] There was, however, a view that it would appear difficult — except in the case of the unification of two States — to determine, among the States concerned, which one was under the obligation that corresponded to the right proclaimed in article 1.[39]

25. It was observed that it was justifiable to consider the right to a nationality as a human right since nationality was often a prerequisite for exercising other rights, in particular the right to participate in the political and public life of a State.[40]

26. A number of States expressed satisfaction with the Commission's neutral approach to the issue of multiple nationality. But some believed that the draft articles should elaborate further on this question, as did the European Convention on Nationality.[41] There was also the view that dual or multiple nationality raised a number of difficulties and should therefore be discouraged.[42] The point was further made that while it was essential to establish the right

[35] A/CN.4/493, comments by Switzerland (General remarks).
[36] Ibid., comments by Italy.
[37] A/CN.4/483, para. 8; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).
[38] A/CN.4/493, comments by the Czech Republic.
[39] Ibid., comments by Switzerland.
[40] A/CN.4/483, para. 8.
[41] Council of Europe document DIR/JUR (97)6.
[42] A/CN.4/483, para. 9; A/CN.4/493, comments by Brunei Darussalam; A/CN.4/496, para. 135.

to a nationality it was questionable whether it was necessary to establish the right to at least one nationality.[43]

27. It was also noted that since article 1 contained terms which were defined in article 2, the order of the two articles should be reversed.[44]

Article 2. Use of terms

28. Concerning the expression "succession of States", it was suggested to define it as "the replacement of one State by another in the responsibility for the administration of the territory and its population", since the draft articles involved, to a much greater extent than the two Vienna Conventions on the Succession of States on which the current definition was based, the internal legal bond between a State and individuals in its territory rather than the international relations of the State.[45]

29. As to the expression "person concerned", the Commission stressed in its commentary that the definition in subparagraph (f) was restricted to the clearly circumscribed category of persons who *had* in fact the nationality of the predecessor State. The Commission indicated that it might consider at a later stage whether it was necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality, were unable to complete the procedural stages involved because of the occurrence of the succession.[46] One member of the Commission expressed reservations about the definition contained in subparagraph (f), particularly on the grounds that it was imprecise. In his view, "persons concerned" were, in accordance with international law, either all nationals of the predecessor State, if it disappeared, or, in the other cases (transfer and separation), only those who had their habitual residence in the territory affected by the succession. The successor State might of course expand the circle of such persons on the basis of its internal law, but it could not do so automatically, since the consent of those persons was necessary.[47]

30. One State referred to paragraph (6) of the commentary to this article, which contained a sentence reading "stateless persons ... resident [in the absorbed territory] are in the same position as born nationals of the predecessor State".[48] It expressed the view that, taken by itself, the sentence could be misleading and should be modified.[49]

31. The view was also expressed that it was necessary to define in article 2 the parameters of the concept of habitual residence.[50]

---

[43] A/CN.4/493, comments by Greece.

[44] Ibid., comments by Guatemala.

[45] A/CN.4/483, para. 10; A/CN.4/496, para. 137.

[46] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (10) of the commentary to article 2, p. 34.

[47] Ibid., para. (12) of the commentary to article 2.

[48] Ibid., p. 32.

[49] A/CN.4/493, comments by Switzerland.

[50] A/CN.4/483, para. 10.

Article 3. Prevention of statelessness

32. The importance of this provision was highlighted by several States.[51] The view was expressed[52] that the text as well as the objective of prevention of statelessness had benefited from the deletion of the restrictive criterion of habitual residence which had been included in the corresponding principle (b) contained in the 1996 report of the Commission.[53] It was noted, moreover, that the obligation to avoid statelessness had been concretized and made operational in several other articles, such as article 6, or the savings clauses in articles 7, 8 and 18.[54]

33. The point was made that while it was certainly necessary to prevent statelessness the conferral of nationality should remain the sole prerogative of the State concerned.[55]

34. The suggestion was made, in view of the definition of "person concerned" in article 2 (f), to replace in article 3 the words "persons who, on the date of the succession of States, had the nationality of the predecessor State" by the term "persons concerned".[56]

35. Attention was drawn to paragraph (6) of the commentary to article 3, according to which the article set out an obligation of conduct, rather than one of result, in respect of the States concerned.[57] The view was expressed in this connection that given the difficulty in determining which State was bound by this obligation, article 3 might be worded in terms of an *objective* to be attained rather than in terms of an obligation of conduct, at least if the form selected for the draft articles was that of a treaty.[58]

Article 4. Presumption of nationality

36. Some States endorsed the presumption in article 4. It was remarked that the provision constituted a useful savings clause and an innovative solution to the problem of statelessness that could arise as a result of a succession of States.[59]

37. It was observed that the qualified presumption of nationality on the basis of habitual residence was a further application of the principle of the need for a genuine link between the State and the individual with respect to nationality,[60] which must not be based on formality or artifice; the criterion of habitual residence was one most frequently used in State succession to identify the initial population constituting the successor State.[61] However, there was also the view that a presumption of nationality should not be based on the sole criterion of habitual residence, but rather on the well-established principles of *jus soli* and *jus sanguinis*. It was argued in this connection that mere residence in a State was not

[51] Ibid., para. 11; A/CN.4/493, comments by Argentina, France and Italy; A/CN.4/496, para. 135.

[52] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[53] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 86.

[54] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[55] A/CN.4/483, para. 11.

[56] A/CN.4/493, comments by Guatemala.

[57] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 36.

[58] A/CN.4/493, comments by Switzerland.

[59] A/CN.4/483, para. 12.

[60] Ibid., para. 14.

[61] A/CN.4/493, comments by Italy.

sufficient evidence of a genuine link with that State and did not necessarily entail loyalty, which was considered crucial.[62]

38. The point was made that the presumption in article 4 could be rebutted not only by other provisions of the draft articles, but also by the terms of specific agreements between States concerned.[63]

39. Certain States questioned the wisdom of including article 4, pointing out that the provision had no general application. In the case of unification of States, it was superseded by the provision in article 21 that *all* persons concerned acquired the nationality of the successor State. In the case of transfer of part of a territory, which required by definition an agreement between the States concerned, such agreement would obviously contain provisions on the nationality of persons having their habitual residence in the transferred territory, which might not necessarily be consistent with the presumption in article 4 (and when the treaty remained silent on the question of nationality, the presumption was to the contrary, i.e., in such case, the persons concerned retained their nationality).[64] In the case of the dissolution of a federal State or separation of one of its units, there was no reason to disregard the criterion of the citizenship of such a unit, recognized under the federal constitution, in favour of that of habitual residence, which was not helpful in clarifying the situation of persons living in a third State.[65]

40. It was noted that Part II of the draft articles, in which the general provisions of Part I were applied to specific categories of succession of States, was to a large extent based on the criterion of habitual residence. It was felt, however, that to suggest this criterion to the States concerned for their consideration — which was the purpose of Part II — was not the same as to formulate a presumption which would determine also the behaviour of third States.[66]

41. The view was also expressed that, while article 4 moved somewhat closer to the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm this rule.[67]

42. There was still another view that the presumption of nationality established by article 4, which could function only as a provisional nationality, would place its beneficiaries in the position of having a nationality which was subject to a decision independent of the will of the person concerned. The precariousness of this attribution of nationality would inevitably extend to rights and public offices that the person concerned might obtain by virtue of the possession of that nationality. In principle, the person should be required to relinquish that office, on the date on which the authorities of the successor State determined that such person did not, in fact, have the nationality he or she enjoyed by virtue of the presumption established in article 4. This would violate the principle of acquired rights.

---

[62] A/CN.4/483, para. 14; A/CN.4/493, comments by Brunei Darussalam.

[63] A/CN.4/483, para. 13; A/CN.4/496, para. 138.

[64] A recent example was pointed out in this respect: the Treaty on the State border between the Czech Republic and Slovakia, which provided, among other things, for an exchange of certain territories between the two States. No automatic change of nationality was envisaged as a result of the territorial exchange (and no provision on nationality was included in the Treaty). A/CN.4/493, comments by the Czech Republic.

[65] A/CN.4/483, para. 15; A/CN.4/493, comments by the Czech Republic.

[66] A/CN.4/493, comments by the Czech Republic.

[67] Ibid., comments by Greece.

The draft articles should therefore stipulate that persons having a presumed nationality under article 4 should not enjoy, even provisionally, rights which might be exercised only by persons who definitively had the nationality of the successor State. In this case, the presumed nationality under article 4 would be a mere fiction, since the only benefit it would provide would be the right to reside in the territory of the successor State, which persons concerned enjoyed, in any case, under article 13. Alternatively, the draft articles could provide that, if persons having the presumed nationality in question could, on the basis of that nationality, invoke acquired rights, they should be allowed to become naturalized under particularly favourable conditions; or that if such persons must be allowed to opt for the nationality of the successor State in order to continue enjoying the acquired rights exercised by virtue of the presumption after having lost the benefit of the latter, then that right of option should enable them to do so.[68]

43. The question was raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12, namely, that of a child without nationality.[69]

Article 5. Legislation concerning nationality and other connected issues

44. Several States expressed support for this provision.[70] Some held that the article should establish an obligation rather than merely making a recommendation, and believed that the conditional form ("should") should be replaced by the imperative ("shall").[71]

45. Several drafting suggestions were made in respect of this provision. It was thus proposed in the first sentence to replace the words "consistent with", by the words "which will give effect to". It was noted that greater precision could be achieved by rewording the end of the second sentence, so that it would read "on their status and their conditions". Furthermore, the word "consequences", in the penultimate line, was considered too vague and its replacement was therefore advocated.[72]

Article 6. Effective date

46. Support was expressed for this article.[73]

47. It was noted that, according to the provision, the attribution of nationality took effect on the date of the succession; in other words, it was usually retroactive. This retroactivity was also stipulated when the person concerned acquired a nationality by exercising a right of option, but only if, without retroactivity, the person would have been left temporarily stateless. The question was raised in this connection as to whether this latter condition should not be extended to all cases of attribution of nationality, i.e., to the whole of article 6,

[68] Ibid., comments by Guatemala.
[69] Ibid., comments by Switzerland.
[70] Ibid., comments by Argentina, Brunei Darussalam, the Czech Republic and France.
[71] Ibid., comments by Argentina and Switzerland.
[72] Ibid., comments by France.
[73] Ibid., comments by Brunei Darussalam.

instead of being limited to the case of the exercise of a right of option. The suggested amendment would have the advantage of limiting the retroactivity to the extent strictly necessary.[74]

48. According to another view, while article 6 moved somewhat closer towards the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by the succession, it did not confirm such rule. It was noted, however, that even though the said rule had not been established in Part I, it was followed in the specific provisions of Part II (articles 20, 21, 22(a) and 24(a)).[75]

Article 7. Attribution of nationality to persons concerned having their habitual residence in another State

49. According to the view of one member of the Commission, paragraph 1 should be drafted in such a manner as to exclude any possibility that a State might attribute its nationality *ex lege*. The majority of the Commission considered that this hypothesis was covered by paragraph 2.[76]

50. Several Governments considered article 7 useful as it clearly indicated that States had certain prerogatives regarding the attribution of their nationality in relation to State succession.[77]

51. The view was expressed that the Commission had made a major step in the direction of the development of international law by providing for a considerable role for the will of persons concerned in the draft articles but that it was nevertheless essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[78]

52. The point was made that States had a right to seek to prevent successions of States from leading to dual and multiple nationality and that article 7 reflected that aim,[79] even though the Commission claimed to be neutral on this point. However, paragraph 1 placed at a disadvantage those persons who, while having the nationality of a third State, also had "appropriate connections" other than residence with the successor State (family ties, for example). Still, to the extent that the successor State retained the *possibility* of offering its nationality to such individuals, the solution suggested in article 7, paragraph 1, would seem to be acceptable.[80]

53. While some delegations endorsed the principle in paragraph 2, others expressed reservations on the grounds that it was inconsistent with the provision in article 10, paragraph 2, and that States could thus abuse the occurrence of succession to extend their

[74] A/CN.4/483, para. 17; A/CN.4/493, comments by Switzerland.

[75] A/CN.4/493, comments by Greece.

[76] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (4) of the commentary to article 7, p. 44.

[77] A/CN.4/483, para. 18.

[78] A/CN.4/493, comments by the Czech Republic.

[79] Ibid., comments by France.

[80] Ibid., comments by Switzerland.

jurisdiction into the territory of other States by attributing their nationality to persons concerned residing in the territory of such other States.[81]

54. There was also the view that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.[82]

55. Drafting suggestions included the insertion of the prefix "Non-" at the beginning of the title of article 7 (immediately before the word "Attribution", (cf. the title of article 14)) and of the words "against their will" after the word "nationality" in paragraph 2, as well as the deletion of the words "against the will of the persons concerned" in the next line of that paragraph. It was further proposed to delete, at the beginning of paragraph 1, the words "Subject to the provisions of article 10" and to insert a reference to article 7 at the beginning of article 10, paragraph 1, which would thus read "Subject to the provisions of article 7, States concerned ..."[83]

Article 8. Renunciation of the nationality of another State as a condition for attribution of nationality

56. While some States considered article 8 to be of practical significance since it enunciated clearly the relevant rights and obligations of States concerned, others felt that it dealt with issues not directly connected to a succession of States which were better left to national legislation, as partly recognized by the use of non-mandatory language.[84]

57. The view was expressed that, while the commentary seemed to imply that the draft was neutral on the question of dual/multiple nationality, article 8 allowed States which had a policy of single nationality to enforce such policy.[85]

58. The need was stressed to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[86]

Article 9. Loss of nationality upon the voluntary acquisition of the nationality of another State

59. As was the case with article 8, some States considered article 9 to be of practical significance, while others felt that it dealt with issues not directly connected to a succession of States.[87]

60. Referring to paragraph (5) of the commentary to article 9 stating that withdrawal of the nationality of the predecessor State cannot occur "before such persons effectively acquire the nationality" of the other State,[88] the view was expressed that this stipulation was so warranted and so essential that it should be included in the actual text of the article.[89]

---

[81] A/CN.4/483, para. 18.

[82] A/CN.4/493, comments by France.

[83] Ibid., comments by Guatemala.

[84] A/CN.4/483, para. 19; A/CN.4/493, comments by Greece.

[85] A/CN.4/493, comments by Brunei Darussalam.

[86] Ibid., comments by the Czech Republic.

[87] A/CN.4/483, para. 19; A/CN.4/493, comments by Greece.

[88] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), p. 49.

[89] A/CN.4/493, comments by Switzerland.

61. As was done with respect to articles 7 and 8, it was stressed that it was essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States.[90]

Article 10. Respect for the will of persons concerned

62. Several States underscored the importance of article 10. The point was made that the right of option was a powerful instrument for avoiding grey areas of competing jurisdictions.[91] It was also underlined that article 10 ranged among those articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law.[92] The view was further expressed that the provision reflected a sufficiently well-established conventional and internal practice of States, especially in the cases of the formation of a new State and the cession of territory, which favoured the residents of the territory in question or persons originating therein.[93]

63. According to another view, the wording should make clear that article 10 only applied to rare cases.[94] The point was also made that, in the past, the right of option had usually been granted to a particular group of persons on the basis of an international agreement and entailed a choice *between* nationalities, while article 10 reflected the more recent practice of a choice to acquire the nationality of a State under its internal legislation, a phenomenon more adequately reflected by the phrase "free choice of nationality".[95]

64. It was observed that it was essential to preserve the balance between provisions concerning the will of individuals (article 10) and those ensuring certain prerogatives of States (articles 7 to 9).[96]

65. Paragraph 1 was interpreted as meaning that, while a person concerned was to be given a choice as to which *among* the nationalities of two or more States he or she wanted, such person did not have the right to choose two or more nationalities.[97]

66. With respect to paragraph 2, some members of the Commission considered that, in the absence of objective criteria for determining the existence of an "appropriate connection", this provision introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of "genuine link". Others considered that what constituted an "appropriate connection" in a particular case was spelled out in detail in Part II and that the use of the concept of "genuine link" in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.[98]

---

[90] Ibid., comments by the Czech Republic.

[91] A/CN.4/483, para. 20; A/CN.4/496, para. 136.

[92] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[93] Ibid., comments by Italy.

[94] A/CN.4/483, para. 20.

[95] Ibid., para. 21.

[96] A/CN.4/493, comments by the Czech Republic.

[97] Ibid., comments by Brunei Darussalam.

[98] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (10) of the commentary to article 10, p. 53.

67. Several States expressed support for the provision in paragraph 2. It was felt, however, that the terms "appropriate connection" needed further clarification.[99] Moreover, a number of States expressed preference for the use, instead, of the well-established phrases "genuine link" or "effective link", which were considered more objective standards.[100] It was further suggested to harmonize, for the sake of consistency, the text of draft articles 10 and 18 and to use the expression "genuine and effective link" in both.[101]

68. There was also the view that persons having effective links with the predecessor State or, where applicable, with other successor States (as was the case, in particular, of persons who, as a result of the succession of States, became minorities within the new State) must have the right to choose between the nationality of these States and that of the successor State which had taken the initiative with regard to the right of option and organized it. Instead, article 10, paragraph 2, envisaged a limited right of option which gave no other choice to persons than that of choosing the nationality of the State granting the right of option. It was felt that the above-mentioned traditional right should, however, be reflected in the draft.[102]

69. As to paragraph 3, it was superfluous, according to one view: it was unthinkable that a State could fail to attribute its nationality to a person who had exercised a right of option in favour of that nationality, since the exercise of that right and the attribution of nationality were two sides of the same coin.[103]

70. Concerning paragraph 4, it was believed that the rights of States should not be reduced excessively to the benefit of the rights of individuals and that States should retain control over the attribution of nationality. Thus, paragraph 4 was considered too restrictive[104] or too categorical; it was considered preferable to say that the State whose nationality persons entitled to the right of option had renounced might withdraw its nationality from such persons only if they would thereby not become stateless.[105]

71. As regards paragraph 5, it was felt that it required further clarification,[106] in particular with respect to the use of the expression "reasonable time limit".[107]

72. It was also considered that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was difficult to understand.[108]

73. The following interrelated changes were proposed in articles 7 and 10: at the beginning of article 7, paragraph 1, the words "Subject to the provisions of article 10" should be deleted; a reference to article 7 should be inserted at the beginning of article 10, paragraph 1, which would read, "Subject to the provisions of article 7, States concerned..."[109]

[99] A/CN.4/493, comments by Brunei Darussalam.
[100] A/CN.4/483, para. 22.
[101] A/CN.4/496, para. 137.
[102] A/CN.4/493, comments by Greece.
[103] Ibid., comments by Guatemala.
[104] A/CN.4/496, para. 136.
[105] A/CN.4/493, comments by France.
[106] A/CN.4/483, para. 24.
[107] A/CN.4/496, para. 137.
[108] A/CN.4/493, comments by France.
[109] Ibid., comments by Guatemala.

Article 11. Unity of a family

74. Some members of the Commission were of the view that article 11 went beyond the scope of the present topic. Others, however, believed that it was closely connected to nationality issues in relation to the succession of States, as the problem of family unity might arise in such context on a large scale.[110]

75. Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 owing to the different interpretations of the concept of "family" in various regions of the world. Others were of the view that a succession of States usually involved States from the same region sharing the same or a similar interpretation of this concept, so that the problem did not arise.[111]

76. There were also divergent views of States on the need for the inclusion of article 11. While some States were in favour of such an approach, others felt that the article raised a broader issue which was outside the scope of the topic.[112]

77. It was observed that article 11 ranged among several articles which embodied principles and rules that were intended to protect the human rights of the persons concerned and which took into consideration the current stage of development of human rights law. Agreement was voiced with the Commission' s view that acquisition of different nationalities by the members of a family should not prevent them from remaining together or being reunited.[113] While it was highly desirable to enable members of a family to acquire the same nationality upon a succession of States, a change of nationality of one of the spouses during marriage should not automatically affect the nationality of the other spouse. Reference was made also to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, according to which a change of nationality by the husband during marriage shall not automatically change the nationality of the wife.[114]

78. It was also pointed out that article 11 went beyond a common limit found in almost all international conventions and internal legislations on the matter providing for a simultaneous change of nationality of the family members at the time the family head changed his or her nationality. In most cases this solution entailed discrimination against women, whose status was thus subordinate to that of men.[115]

79. It was further observed that the article should not be interpreted as meaning that all members of a family remaining together had to have the same nationality, since that would contravene the principle of respect for the will of persons concerned; but a State could consider the unity of a family as a factor for granting nationality to certain family members under more favourable terms.[116]

80. However, the point was also made that, while the principle of family unity was an important one, habitual residence ought to be considered the most important criterion in determining nationality.[117] The remark was further made that, while the principle reflected

---

[110] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (6) of the commentary to article 11, p. 56.

[111] Ibid., para. (7).

[112] A/CN.4/483, paras. 25 and 26; A/CN.4/496, para. 138.

[113] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to article 11, p. 56.

[114] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[115] Ibid., comments by Italy.

[116] A/CN.4/483, para. 25.

[117] A/CN.4/496, para. 138.

in article 11 was sound, it might give rise to difficulties as to the definition and interpretation of the meaning of the term "family".[118]

81. There was also the view that article 11 appeared to have major implications regarding the law of residence which were not in keeping with the aim of the draft. Although there was nothing jarring about this provision in substantive terms, it really had no place in the text.[119]

Article 12. Child born after the succession of States

82. Support was expressed for the provision in article 12. It was observed that the granting of the nationality of the State concerned on whose territory a child was born under this article covered both options envisaged in the 1961 Convention on the Reduction of Statelessness, i.e. granting of nationality at birth by operation of law and granting of nationality upon application to the appropriate authority in the manner prescribed by national law.[120] It was also felt that article 12 constituted a useful development of article 24 of the International Covenant on Civil and Political Rights and of article 7 of the Convention on the Rights of the Child.[121]

83. However, it was noted that while it appeared from the commentary that the scope of the article was limited to the period directly following a succession of States, it was not clear for how much time after the succession the article was to apply.[122]

84. The question was also raised as to whether the solution proposed in article 12 of the draft did not pose the risk, in certain cases, of a number of different nationalities within a single family and whether it would not be preferable to extend the presumption of nationality of the State of habitual residence set out in article 4 to the situation envisioned in article 12.[123] Where such presumption was not applicable, the matter would be resolved in accordance with the general obligation of the State in which the child had been born to prevent statelessness in accordance with article 3.[124]

85. It was further suggested that the article should be adjusted so as to ensure that a child whose parents subsequently acquired, upon option, a nationality other than that of the State in which he or she had been born would be entitled to the parents' nationality. Attention was drawn specifically to the case where the parents subsequently acquired the nationality of a State which applied the principle of *jus sanguinis*.[125] Article 12 seemed, according to one view, to have a bias towards the principle of *jus soli*.[126]

86. A view was also expressed that the article should be deleted as it addressed a nationality issue not directly related to a succession of States.[127]

---

[118] A/CN.4/493, comments by Brunei Darussalam.
[119] Ibid., comments by France.
[120] A/CN.4/483, para. 27.
[121] A/CN.4/493, comments by the Czech Republic and Italy.
[122] Ibid., comments by Brunei Darussalam.
[123] Ibid., comments by Switzerland.
[124] A/CN.4/483, para. 29.
[125] Ibid., para. 28.
[126] A/CN.4/493, comments by France.
[127] A/CN.4/483, para. 29; A/CN.4/493, comments by Greece.

Article 13. Status of habitual residents

87. When this provision was discussed in the Commission, some members believed that international law currently allowed a State concerned to require that persons who voluntarily became nationals of another State concerned transferred their habitual residence outside of its territory. Those members stressed, however, that it was important to ensure that persons concerned were provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his third report.[128] Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement. For some members, this entailed moving into the realm of *lex ferenda*.

88. Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. The Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of the persons concerned as habitual residents.[129]

89. Several States endorsed article 13.[130] The principle enshrined in paragraph 1 was thus considered to constitute a useful guarantee for the respect of the rights of individuals.[131] It was observed that while a change of nationality of persons habitually resident in a third State would not affect their status as permanent residents, it might affect their rights and duties.[132]

90. The Commission was encouraged to consider whether the article should be complemented by a more specific provision on the right of residence, i.e., the right of habitual residents of the territory over which sovereignty was transferred to a successor State to remain in that State even if they had not acquired its nationality.[133] Reference was made in this context both to the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, adopted by the European Commission for Democracy through Law in 1996 (Venice Commission),[134] according to which the exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein; as well as to article 20 of the European Convention on Nationality.

91. There was also the view that article 13 was clearly in the sphere of *lex ferenda* and not *lex lata*.[135] However desirable it might be to limit massive forced population transfers as much as possible, the article addressed questions which were not directly related to the Commission's mandate, as it dealt more with succession of States and the law of aliens than with nationality, and therefore did not belong in the text.[136] It was also felt that the

---

[128] A/CN.4/480, draft article 10, paragraph 3.

[129] *Official Records of the General Assembly, Fifty-second Session*, Supplement No. 10 (A/52/10), paras. (4) to (6) of the commentary to article 13, pp. 60–61.

[130] A/CN.4/483, para. 30; A/CN.4/493, comments by the Czech Republic, Finland (on behalf of the Nordic countries) and Italy.

[131] A/CN.4/493, comments by the Czech Republic.

[132] A/CN.4/483, para. 30.

[133] Ibid., A/CN.493, comments by Finland (on behalf of the Nordic countries).

[134] Council of Europe document CDL-NAT (96) 7 rev.

[135] A/CN.4/493, comments by France.

[136] A/CN.4/483, para. 31; A/CN.4/493, comments by France; A/CN.4/496, para. 138.

Commission should rather have recalled the principle that State succession did not as such affect the acquired rights of natural and juridical persons.[137]

Article 14. Non-discrimination

92. Some members of the Commission regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending upon whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. Others believed that that was a human rights issue of a more general character and therefore outside the scope of the present draft articles.[138]

93. Several States expressed the view that the article was of the utmost importance.[139] It was noted that the provision addressed one of the most important and most difficult aspects of the protection of human rights,[140] in particular the rights of minorities, as already indicated by the Permanent Court of International Justice in connection with a dispute on the acquisition of Polish nationality.[141] It was stressed that both the American Convention on Human Rights and the International Covenant on Civil and Political Rights referred specifically to equality before the law and to the protection of ethnic, religious and linguistic minorities, thus prohibiting discrimination.[142]

94. On the one hand, there was support for the Commission's approach not to include an illustrative list of criteria on the basis of which discrimination was prohibited,[143] in order to avoid the risk of any *a contrario* interpretation.[144] On the other hand, there was the view that the current formulation was too broad, as it might, for example, prohibit any distinction, where the nationality of a successor State was being acquired, between individuals residing in the territory of that State and other persons.[145] It was therefore found preferable to spell out the grounds on which discrimination was prohibited, and the following were suggested for inclusion in such a list: race, colour, descent, national or ethnic origin, religion, political opinion, sex, social origin, language or property status.[146]

95. The view was expressed that the article should also prohibit discriminatory treatment of its nationals by a successor State depending on whether they already had its nationality prior to the succession of States or had acquired it as a result of such succession.[147] It was further felt that this provision should be expanded to provide also for complete equality between new and long-term nationals in respect of their status and rights in general.[148]

---

[137] A/CN.4/483, para. 31.

[138] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to article 14, p. 63.

[139] A/CN.4/483, para. 32; A/CN.4/493, comments by Finland (on behalf of the Nordic countries); A/CN.4/496, para. 138.

[140] A/CN.4/493, comments by Italy.

[141] Advisory opinion on the question of *Acquisition of Polish Nationality, P.C.I.J. 1923, Series B*, No. 7, p. 15.

[142] A/CN.4/493, comments by Argentina.

[143] A/CN.4/483, para. 32.

[144] A/CN.4/493, comments by Italy.

[145] A/CN.4/483, para. 32; A/CN.4/493, comments by Brunei Darussalam and Switzerland.

[146] A/CN.4/483, para. 32.

[147] Ibid., para. 34.

[148] A/CN.4/493, comments by Greece.

96. It was also observed that a clear distinction should be made between a situation in which a particular requirement, such as that of a clean criminal record, would prevent a person concerned from acquiring the nationality of at least one of the successor States and would constitute discrimination prohibited by article 14, and a situation in which such requirement constituted a condition for naturalization, which was outside the scope of the draft articles.[149] Reference was made, in this connection, to the Commission's commentary to article 14 containing a footnote with an extensive reference to the requirement of a clean criminal record.[150]

97. As regards the question whether a State concerned might use certain criteria for enlarging the circle of individuals entitled to acquire its nationality, which was not addressed in article 14, the view was expressed that in such case the will of the individual must be respected.[151]

98. There was also the view that the article addressed a broader issue which was outside the scope of the topic.[152]

Article 15. Prohibition of arbitrary decisions concerning nationality issues

99. Some States drew particular attention to the importance of this article, stressing that it constituted a useful guarantee for the respect of the rights of individuals.[153] Reference was also made to article 20, paragraph 3, of the American Convention on Human Rights, stating that no one shall be arbitrarily deprived of his nationality or of the right to change it.[154]

100. It was said that often treaty provisions or national citizenship laws which were generous on paper ended up being considerably restricted in the phase of practical implementation. It was therefore important to expressly prohibit arbitrary decisions on nationality issues, as has been done in article 15, and to include procedural safeguards for the respect for the rule of law, such as the requirements in article 16.[155]

Article 16. Procedures relating to nationality issues

101. The importance of article 16 was highlighted by several States.[156] Attention was also drawn to the formulation in paragraph 3 of the Venice Declaration reading: "Any deprivation, withdrawal or refusal to confer nationality shall be subject to an effective remedy."[157] The suggestion was made to include among the procedural guarantees "reasonable fees" and also the requirement that reasons for any decision should be given

[149] A/CN.4/483, para. 33; A/CN.4/493, comments by the Czech Republic.

[150] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), p. 62, footnote 98.

[151] A/CN.4/483, para. 35.

[152] Ibid., para. 36.

[153] Ibid., para. 37; A/CN.4/493, comments by the Czech Republic and Italy; A/CN.4/496, para. 138.

[154] A/CN.4/493, comments by Argentina.

[155] Ibid., comments by Brunei Darussalam and Finland (on behalf of the Nordic countries).

[156] Ibid., comments by the Czech Republic and Finland (on behalf of the Nordic countries).

[157] A/CN.4/483, para. 38.

in writing, as did the European Convention on Nationality (articles 13 and 11, respectively).[158]

102. The view was, however, expressed that article 16 was too detailed. It was suggested to amend the text so as to provide that States must "take appropriate measures to process without delay" the applications referred to in article 16.[159]

Article 17. Exchange of information, consultation and negotiation

103. The obligations set out in article 17 were considered necessary to ensure the effectiveness of the right to a nationality.[160] It was pointed out that this provision obviously should be read together with the other articles in the draft which were interrelated and gave a content to the duty to consult and negotiate. Nonetheless, it was felt that it was advisable to add a sentence stating explicitly that States concerned were also under the obligation to ensure that the outcome of the negotiations was in compliance with the principles and rules contained in the draft articles.[161]

104. The view was expressed that agreement was not an indispensable means of solving nationality problems and that legislative measures adopted by a State concerned with full knowledge of the content of the legislation of other States concerned might be sufficient to prevent detrimental effects on nationality arising from a succession of States.[162]

Article 18. Other States

105. Some members of the Commission expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. It was stated in particular that it would be difficult to apply the article in practice and that the provision would allow States to take the law into their own hands.[163]

106. Several States expressed support for the article. The view was expressed that the Commission had addressed with great clarity one of the key functions of international law in connection with nationality, i.e., to delimit the competence of States in this area. It was added that the provision was perfectly consistent with the line of legal logic followed throughout the draft articles.[164]

107. It was also held that it would be worth excluding article 18 from the draft, as it had no direct relationship with the question of the succession of States. Moreover, it concerned an extremely delicate matter — control of States in respect of a competence which was strictly linked to their sovereignty — and was liable to raise more problems than it would resolve.[165]

---

[158] Ibid.; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[159] A/CN.4/493, comments by France.

[160] A/CN.4/483, para. 39.

[161] Ibid.; A/CN.4/493, Finland, on behalf of the Nordic countries.

[162] A/CN.4/483, para. 40; A/CN.4/493, comments by the Czech Republic.

[163] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[164] A/CN.4/493, comments by Italy.

[165] A/CN.4/483, para. 43; A/CN.4/493, comments by Greece.

108. It was suggested that, in view of the definition contained in article 2 (e), it might be appropriate to change the title of article 18 to "Third States".[166]

109. As regards paragraph 1, some members of the Commission argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States.[167]

110. Some States felt that paragraph 1 reflected the general principle of non-opposability vis-à-vis third States of nationality granted without the existence of an effective link between the State and the person concerned. Reference was made in this respect to the Hague Convention of 1930.[168] The proviso preventing the treatment of a person having no effective link with a State concerned as a de facto stateless person was however considered to be fully justified.[169]

111. It was noted that the Commission did not in fact address the substance of the criteria for identifying the existence of an effective link, but that point was not included in its terms of reference, and in any event reliance on international jurisprudence (i.e. the *Nottebohm* case[170] and the *Flegenheimer* case[171]) could assist those called upon to deal with this issue.[172]

112. There was a view, however, that paragraph 1 overemphasized the principle of effective nationality.[173] It was felt that this provision, which appeared to authorize any State to contest the nationality granted to an individual by another State, was very questionable. It was pointed out that although in its judgment rendered in 1955 in the *Nottebohm* case the International Court of Justice had indeed emphasized that nationality should be effective and that there should be a social connection between the State and the individual, the judgment had been criticized and had remained an isolated instance. The extension of the principle of effectiveness in paragraph 1 appeared to be based on the idea that a State must take an attribution of public international law as a basis for granting its nationality, whereas the opposite applied in practice.[174]

113. It was suggested that the phrase "effective link" should be replaced either by "genuine link" used in article 5, paragraph 1, of the 1958 Geneva Convention on the High Seas and article 91, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, or by "genuine and effective link", which covered both terms used by the International Court of Justice in the *Nottebohm* case and was contained in article 18, paragraph 2 (a), of the European Convention on Nationality. It was further proposed that the terminology in articles 10 and 18, paragraph 1, should be harmonized in this respect.[175]

114. Concerning paragraph 2, certain members of the Commission were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly

---

[166] A/CN.4/493, comments by Guatemala.

[167] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[168] A/CN.4/493, comments by the Czech Republic and Finland (on behalf of the Nordic countries).

[169] Ibid., comments by the Czech Republic.

[170] *ICJ Reports 1955*, p. 4.

[171] United Nations, *Reports of International Arbitral Awards*, vol. XIV, p. 327.

[172] A/CN.4/493, comments by Italy.

[173] A/CN.4/496, para. 138.

[174] A/CN.4/493, comments by France.

[175] A/CN.4/483, para. 41; A/CN.4/496, para. 137.

provided that other States could treat a stateless person as a national of a particular State concerned only "for the purposes of their domestic law".[176]

115. Several States expressed their support for the provision in paragraph 2. It was observed that it constituted a remedy for the violation of the right to a nationality. It was suggested that the actual text of the paragraph should provide a clarification of the following points made in the commentary: that the provision gave third States the right to treat stateless persons as nationals of a given State, even where statelessness could not be attributed to an act of the State but where the persons concerned had by their negligence contributed to the situation; and that it was intended to redress situations resulting from discriminatory legislation or arbitrary decisions, which were prohibited by articles 14 and 15, by extending to persons referred to in the paragraph the favourable treatment granted to nationals of the State in question and protecting them from possible deportation.[177]

116. It was stressed that paragraph 2 focused exclusively on the relationship between persons who had become stateless and a third State. Drafted in the form of a saving clause, this provision preserved the delicate balance between the interests of States which could be involved in a situation of this kind.[178]

Part II. Provisions relating to specific categories of succession of States

117. As regards the typology used in Part II, it was considered more satisfactory than that of Part II of the 1978 Convention on the Succession of States and Part II of the 1983 Convention on the Succession of States. It was noted in particular that a clearer distinction was drawn between merger and absorption.[179] It was also observed that the distinction between secession and dissolution was preserved while ensuring that the provisions in both sections were similar.[180] The point was made however, that categories of succession which had been determined in theory were often difficult to identify in practice and that this might impair the effectiveness of the draft articles.[181]

118. The Commission did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future. Some members of the Commission, however, would have preferred the inclusion of such an additional section.[182]

119. Several States endorsed the above decision of the Commission not to separate cases of State succession from the specific phenomenon of decolonization, as they considered this distinction to be irrelevant in the context of the nationality of natural persons and the decolonization process to be nearly at an end.[183] It was also argued that the practice in cases

[176] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (9) of the commentary to article 18, p. 72.

[177] A/CN.4/483, para. 42; A/CN.4/493, comments by Finland (on behalf of the Nordic countries) and Switzerland.

[178] A/CN.4/493, comments by the Czech Republic.

[179] Ibid., comments by France.

[180] A/CN.4/483, para. 44; A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[181] A/CN.4/483, para. 44; A/CN.4/493, comments by Italy.

[182] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to article 19, p. 73.

[183] A/CN.4/483, para. 44; A/CN.4/493, comments by Switzerland.

of decolonization was often indistinguishable from the practice relating to other cases of succession.[184] The point was further made that decolonization could take different forms, including the achievement of independence by Non-Self-Governing Territories, the restoration of the territorial integrity of another State or the division of the territory into several States; these cases could be resolved satisfactorily by applying the principles and rules contained both in Part I or the draft articles and, to some extent, in Part II in any remaining case of decolonization in the future.[185]

120. There was also the view that, although the historical process of decolonization had, to a large extent, been completed, some colonial situations still remained, and that as those situations were addressed, cases might arise in which it would be necessary to apply rules on nationality of natural persons in relation to succession of States.[186] The point was made that the text should at least specify that the established regime applied *mutatis mutandis* to situations of decolonization.[187]

121. It was observed that Part II of the draft articles was intended to provide practical guidelines for States that were in the process of enacting their legislation or negotiating treaties on nationality issues related to a succession of States, and would indeed prove helpful in such situations.[188]

122. The view was expressed that the solutions proposed in Part II were entirely valid from the legal standpoint, for most of them reflected current international practice or constituted the logical consequence of a specific category of succession of States, as, for example, in article 22 dealing with the dissolution of a State.[189]

123. The Commission's decision to use habitual residence as the main criterion for identifying the persons to whom successor States must attribute their nationality was also endorsed. This decision was considered to be consistent with the tendency of international law to give preference to effectiveness.[190]

Article 19. Application of Part II

124. It was observed that the provisions of Part II of the draft articles were aimed at applying the general principles of Part I to different categories of successions of States but not at reflecting existing international law. Part II seemed to be intended mainly as a source of inspiration for States concerned when, for example, they entered into negotiation in order to resolve nationality issues by agreement or when they were considering the adoption of national legislation for the purpose of resolving these issues, in spite of the fact that the actual language of subsequent articles of Part II appeared fairly strong (using the verb "shall"), as if binding rules were somehow laid down. This might be actually justified even in the framework of an instrument of a declaratory nature if general principles, for the most part soundly based on customary law, were involved, as is the case for Part I of the draft articles. Such language might however prove somewhat confusing and disturbing in the

[184] A/CN.4/493, comments by Italy.

[185] A/CN.4/483, para. 44; A/CN.4/493, comments by Argentina and Finland (on behalf of the Nordic countries).

[186] A/CN.4/483, para. 44; A/CN.4/493, comments by Argentina.

[187] A/CN.4/483, para. 44; A/CN.4/496, para. 139.

[188] A/CN.4/493, comments by Finland (on behalf of the Nordic countries).

[189] Ibid., comments by Italy.

[190] Ibid.

context of Part II, and the Commission could perhaps reconsider whether article 19 was enough to dissipate any possible doubts in this respect.[191]

125. The question was raised as to the relationship, from the legal point of view, between Parts I and II of the draft. Article 19 seemed to give more weight to the provisions of Part I than to those of Part II. Article 10, paragraph 2, provided for granting the right of option only in the case of persons who would otherwise become stateless as a result of the succession, while articles 20, 23 and 26 seemed to grant a much broader right of option. In such cases where there was a difference between the provisions of Part I and those of Part II, the question was raised as to whether States should follow the general provisions or the specific provisions.[192]

126. It was further considered that the substance and the scope of article 19 were unclear and that the commentary on the article shed little or no light on its meaning or usefulness. It appeared that the purpose of the article was to establish differences between the nature and functions of the provisions of Part I and those of Part II. Such differentiation related exclusively to the degree of generality of the provisions in one part as compared to those in the other. There was no difference, therefore, in the normative nature of the provisions in the two parts: those in Part I were as binding as those in Part II. However, it was normal, with few exceptions, for the provisions in Part II i.e., those that were specific, to be in harmony with those in Part I, i.e., those that were general. Moreover, there were no apparent differences between Part I and Part II of the draft articles in respect of provisions that actually or potentially pertained to customary law or *jus cogens*, or that constituted rules of progressive development of international law. In other words, rules of any of these types were to be found in both Part I and Part II. For all the foregoing reasons, it was felt that article 19 should be deleted.[193]

127. It was also stressed that if article 19 was interpreted a *contrario*, the result was that Part I of the draft articles would consist of non-optional provisions. This suggested that the Commission considered that the provisions of Part I reflected existing customary law and, moreover, constituted peremptory rules (*jus cogens*). It would no doubt be desirable to review all the articles in Part I in order to establish whether they all did in fact have that status.[194]

128. Concerning the drafting and placement of article 19, it was suggested that the phrase "in specific situations" should be replaced by "as appropriate". The view was also expressed that the article would be better placed at the end of Part I.[195]

Section 1. Transfer of part of the territory

Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

129. It was noted that the fundamental rule of the law of succession of States whereby, as of the date of succession, the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual

[191] Ibid., comments by the Czech Republic.

[192] Ibid., comments by Greece.

[193] Ibid., comments by Guatemala.

[194] Ibid., comments by Switzerland (comments on the structure of the draft articles).

[195] A/CN.4/483, para. 45.

residence in the territory affected by this succession, which was missing in Part I of the draft articles, was followed in the specific provisions of Part II, including article 20.[196] It was further observed that, as far as the attribution of nationality was concerned, the rule in article 20 was widely recognized in the doctrine and was indeed a reflection of international law.[197] This rule was, moreover, justified by the fact that the successor State could not exercise sovereignty in a territory whose inhabitants remained nationals of the predecessor State.[198]

130. The point was made that the current text of article 20 could be usefully complemented by including a reference to the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory only after such persons acquired the nationality of the successor State. Obviously, this resulted from the State's obligation to prevent statelessness in accordance with article 3, but it was considered preferable to have an explicit clause to that effect, also in view of the fact that such explicit clause had found a place in article 25. Such addition could be drafted along the lines of article 25, paragraph 1, *in fine*.[199]

131. There was also the view that, while some of the provisions of article 20 fell within the category of codification, others, which emphasized the right of option, fell within the category of progressive development. The draft implied that an individual had the right to choose his or her nationality freely. It was felt that the rights of States with respect to nationality, as compared with those of individuals, should not be limited excessively. Unlike in the case of the approach reflected in article 20, it was essential not to end up with "forum shopping" for nationality and to avoid the "privatization" of nationality, which disregarded the public law status of nationality, a matter on which an individual was not free to decide. States had to retain control over the attribution of nationality.[200]

132. It was further argued that granting a right of option to all persons resident in the transferred territory would impose a heavy burden on the predecessor State and, moreover, could have the undesirable effect of creating in the transferred territory a large population having the nationality of the predecessor State; it was therefore suggested that the right of option to be granted by the predecessor State should be limited to persons who had retained effective links with the predecessor State,[201] as had also been proposed by one member of the Commission.[202] It was felt, moreover, that for the sake of symmetry the successor State should also be required to offer a right of option to nationals of the predecessor State who did not reside in the transferred territory, including those residing in a third State, if they had links with that territory.[203]

133. Some members of the Commission were of the view that the provisions of section 1 concerning transfer of territory and section 4 on separation should be drafted along the same lines, as they saw no reason to apply different rules in the two situations.[204] One State expressed a similar view, observing that the only two pertinent differences between transfer and separation were that (a) on transfer the successor State predated the succession, whereas

---

[196] A/CN.4/493, comments by Greece.

[197] A/CN.4/483, para. 46; A/CN.4/493, comments by Argentina.

[198] A/CN.4/493, comments by Argentina.

[199] Ibid., comments by the Czech Republic.

[200] Ibid., comments by France.

[201] A/CN.4/483, para. 46; A/CN.4/493, comments by Greece and Switzerland.

[202] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (5) of the commentary to section 1, p. 76.

[203] A/CN.4/483, para. 46; A/CN.4/493, comments by Switzerland.

[204] *Official Records of the General Assembly, Fifty-second Session, Supplement No.10* (A/52/10), para. (16) of the commentary to section 4, p. 92.

on separation the successor State was born with the succession, and (b) on transfer only part of the successor State's territory was affected by the succession, whereas on separation the whole territory of the successor State was affected. It was suggested that article 20 should therefore be deleted and replaced by three new articles analogous to articles 24, 25 and 26.[205]

Section 2. Unification of States

Article 21. Attribution of the nationality of the successor State

134. Article 21 seems to have received general support. The only specific observation in respect of the article was that it embodied a mandatory rule under international law.[206]

Section 3. Dissolution of a State

Article 22. Attribution of the nationality of the successor State

135. It was noted that, while in Part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, it was followed in the specific provisions of Part II, including article 22 (a).[207]

136. There was, however, also the view that article 22 gave too much prominence to the criterion of habitual residence in disregard of recent practice in Central and Eastern Europe where the primary criterion used was that of the nationality of the former units of federal States.[208]

137. Support was expressed especially for paragraph (b) of article 22.[209] There was, however, also the view that while paragraph (a) reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature and was therefore applicable only with the consent of the persons concerned.[210]

138. A proposal was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).[211] According to still another view, the drafting of article 22 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".[212]

---

[205] A/CN.4/493, comments by Guatemala.

[206] A/CN.4/483, para. 47; A/CN.4/493, comments by Greece.

[207] A/CN.4/493, comments by Greece.

[208] A/CN.4/483, para. 49; A/CN.4/493, comments by Brunei Darussalam; A/CN.4/496, para. 140.

[209] A/CN.4/483, para. 48.

[210] Ibid., para. 49.

[211] Ibid., para. 48; A/CN.4/493, comments by Switzerland.

[212] A/CN.4/493, comments by Guatemala.

Article 23. Granting of the right of option by the successor States

139. The view was expressed that article 23 was not to be read as construing the right of option as the single acceptable means of dealing with the question of the nationality of persons qualified to acquire the nationality of several successor States under the criteria of article 22. This would undoubtedly go beyond *lex lata*, and article 19, as well as article 10, paragraph 1, made it quite clear that the granting of the right of option in this case was merely suggested or proposed to States, not imposed on them. As a matter of fact, other possible alternative approaches were conceivable and did indeed exist concerning the specific issue of persons qualified to acquire the nationality of two or more successor States. These included measures such as negotiations among the States concerned with a view to determining a harmonized single superseding criterion — either the one mentioned in article 22 (a) or one taken from article 22 (b) — or even adopting a unilateral choice of a superseding criterion (obviously in such case with the proviso of granting an appropriate right of option to persons concerned who would otherwise become stateless as a result of the succession of States, in conformity with article 10, paragraph 2). Recent practice in the area of State succession had shown that a variety of such systems could work satisfactorily while being at the same time fully consistent with the fundamental protective principles set forth in Part I. Moreover, it was pointed out in this respect that the Commission, in its commentary to article 10, paragraph 1, on the will of persons concerned, stated that the "expression 'shall give consideration' implies that there is no strict obligation to grant a right of option to this category of persons concerned".[213] From a *de lege lata* perspective, it was therefore considered indisputable that international law tolerated more flexibility than article 22 together with article 23, paragraph 1, seemed to admit, and that article 19 indeed recognized that greater flexibility for applying the principles of Part I to specific situations, including the one envisaged in section 3. However, *de lege ferenda* it might be utterly desirable, with respect to persons *a priori* qualified to acquire several nationalities, to promote the right of option as the most efficient means to address the issue at hand while integrating to the fullest extent possible its human rights dimension. In view of these considerations and also bearing in mind the indicative nature of Part II as provided for in article 19, it was felt that the text of article 23 in its current wording represented a step in the right direction and a laudable attempt on the part of the Commission at progressive development of international law.[214]

140. The point was also made that it was difficult to evaluate the right of option established under article 23, paragraph 1, because it depended upon unknown factors which were exclusively a matter of the domestic law of the States concerned.[215]

141. It was suggested that paragraph 1 should be redrafted as follows: "If under article 22 the nationality of two or more successor States is attributable to persons concerned, those States shall grant a right of option to those persons."[216]

142. It was observed that paragraph 2 was too broad and therefore inconsistent with the provision in article 10, paragraph 2, which limited the categories of persons to whom a successor State had the obligation to grant the right to opt for its nationality.[217]

---

[213] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (8) of the commentary to article 10, p. 52.

[214] A/CN.4/493, comments by the Czech Republic.

[215] Ibid., comments by Greece.

[216] Ibid., comments by Guatemala.

[217] A/CN.4/483, para. 50.

143. It was also stressed that the linkages between articles 7, 10, 22 and 23 should be made clearer because the interrelationship between those provisions was hard to understand. [218]

Section 4. Separation of part or parts of the territory

Article 24. Attribution of the nationality of the successor State

144. It was noted that while in Part I of the draft the fundamental rule of the law of succession of States whereby as of the date of succession the successor State must automatically attribute its nationality to all persons who have the nationality of the predecessor State and have their habitual residence in the territory affected by this succession could not be found, this rule was followed in the specific provisions of Part II, including article 24 (a).[219]

145. Paragraph (b) of article 24 elicited some favourable comments. The view was also expressed that, unlike paragraph (a), which reflected an obligation derived from international law, the rule in paragraph (b) had its source in domestic law and was discretionary in nature. [220]

146. The suggestion was made to merge the situations envisaged in subparagraphs (i) and (ii) of paragraph (b).[221] It was also pointed out that the meaning and scope of the phrases "appropriate legal connection" and "any other appropriate connection" were not clear.[222] It was further suggested that the drafting of article 24 (b) (ii) could be improved by replacing "before leaving" with "on leaving" and deleting the word "last" before "habitual residence".[223]

Article 25. Withdrawal of the nationality of the predecessor State

147. Reservations were expressed with respect to the issue of withdrawal of nationality as addressed in this article. Attention was drawn in this respect to the European Convention on Nationality.[224]

148. Some members of the Commission believed that paragraph 2 of article 25 was superfluous, while others considered it necessary for the purpose of defining the categories of persons to whom a right of option between the nationality of the predecessor and the successor States should be granted.[225]

149. One State also suggested that paragraph 2 should be excluded from the draft, as it concerned a matter of the general policy of States with regard to nationality and had no direct relationship with the question of the succession of States.[226]

---

[218] A/CN.4/493, comments by France.

[219] Ibid., comments by Greece.

[220] A/CN.4/483, para. 51.

[221] A/CN.4/493, comments by Switzerland.

[222] Ibid., comments by Brunei Darussalam; A/CN.4/496, para. 137.

[223] Ibid., comments by Guatemala.

[224] A/CN.4/483, para. 52.

[225] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (11) of the commentary to section 4, p. 91.

[226] A/CN.4/493, comments by Greece.

150. It was again observed that the meaning and scope of the phrases "appropriate legal connection" and "any other appropriate connection" were not clear.[227]

Article 26. Granting of the right of option by the predecessor and the successor States

151. It was stated that the comments pertaining to article 23 of section 3 reflected in paragraph 139 above applied also *mutatis mutandis* to article 26 of section 4.[228]

152. The point was made that reliance on the criterion of habitual residence would be appropriate in most cases, but there could exist a group of persons who, while retaining habitual residence in the successor State, had other important links with the predecessor State, and vice versa; such situations might not be adequately addressed by granting a right of option.[229]

153. The view was also expressed that it was difficult to evaluate the right of option established under article 26, because it depended on unknown factors which were exclusively a matter of the domestic law of the States concerned.[230]

154. It was further remarked that the article was too broad, as it required the predecessor State to grant a right of option even to that part of its population which had not been affected by the succession,[231] an opinion also voiced in the Commission.[232]

Article 27. Cases of succession of States covered by the present draft articles

155. Support was expressed for a provision explicitly limiting the scope of application of the draft articles to successions of States occurring in conformity with international law, although a question was raised as to whether there could be a succession of States that would not meet such a qualification.[233]

156. There were, however, a number of reservations, both in the Commission[234] and among States,[235] as regards the inclusion of the phrase "without prejudice to the right to a nationality of persons concerned", which was considered to render the entire article ambiguous. It was pointed out that the Fourth Geneva Convention of 1949 prohibited any modification of the legal situation of persons and territories under occupation and therefore persons concerned should maintain the nationality they had before annexation or illegal occupation; the imposition by an aggressor State of its nationality on the population of a

[227] Ibid., comments by Brunei Darussalam.

[228] Ibid., comments by the Czech Republic.

[229] A/CN.4/483, para. 53.

[230] A/CN.4/493, comments by Greece.

[231] A/CN.4/483, para. 53; A/CN.4/493, comments by Greece.

[232] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (15) of the commentary to section 4, p. 92.

[233] A/CN.4/483, para. 54; A/CN.4/493 and Corr.1, comments by Argentina; A/CN.4/496, para. 141.

[234] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (3) of the commentary to article 27, p. 93.

[235] A/CN.4/483, para. 55; A/CN.4/493, comments by Finland (on behalf of the Nordic countries), Greece and Switzerland.

territory it had illegally occupied or annexed was unacceptable. Even if the Commission wished to make the right to a nationality a rule of *jus cogens*, that right could not have a place in the context of article 27, which actually envisaged the case of an international crime, a situation that allowed for no exceptions.[236] It was accordingly suggested that the phrase could perhaps be revisited by the Commission.[237]

157. A view was also expressed that the article was unnecessary in a draft dealing with certain human rights issues, as such rights should be protected regardless of whether or not a succession of States had occurred in conformity with international law.[238]

158. As this provision was included in the draft articles at a late stage of the Commission's work on the topic, the Commission left the decision on its final placement for the second reading.[239] In this respect it was suggested that article 27, which defined the scope of the draft articles, including the scope of the general provisions (articles 1–18), should be placed at the beginning of the text,[240] or in Part I.[241]

---

[236] A/CN.4/493, comments by Greece.

[237] Ibid., comments by Finland (on behalf of the Nordic countries).

[238] A/CN.4/483, para. 56.

[239] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. (4) of the commentary to article 27, p. 93.

[240] A/CN.4/493, comments by Switzerland.

[241] A/CN.4/493 and Corr.1, comments by Argentina.